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REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF IDAHO

By I. W. HART
(Ex-officio Reporter)

VOLUME 27

SAN FRANCISCO
BANCROFT-WHITNEY COMPANY
1915

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CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF IDAHO.

(February 13, 1915.)

CHARLES VERHEYEN, Respondent, v. E. H. DEWEY
and NAMPA & MERIDIAN IRRIGATION DISTRICT,
Appellants.

[146 Pac. 1116.]

DAMAGE—IRRIGATION SYSTEM — SEEPAGE — FLOODS — JOINT TRESPASS—
FINDINGS OF FACT—MALICIOUS ACTS—JOINT TORT-FEASORS—EVI-
DENCE—ADMISSION OF—RISING WATER-TABLE—INSTRUCTIONS—NON-
SUIT.

1. Where damages to real and personal property are sought to be recovered from two defendants, and it is alleged in the complaint that such damages were caused by the wrongful and wilful acts of the defendants, in the joint operation and management of a canal system and reservoir, and the evidence shows that one of the defendants is the owner and has operated, managed and controlled such canal and reservoir, and that the other defendant had no title or interest therein, and that such defendant did not manage or control or join in the management and control of such system, and judgment is entered on such evidence against both defendants jointly, the judgment will be set aside and a new trial granted.

2. *Held*, under the evidence that the water was drawn out of Lake Ethel reservoir under the direction of the general manager of the irrigation district, not maliciously, but for the purpose of protecting said irrigation works and the inhabitants of Mason creek basin.

3. The defendants are charged as joint tort-feasors, and where two or more parties act each for himself and independently of each other in a matter that results injuriously to another, they cannot be held jointly liable for the acts of each other.

4. An action at law for damages cannot be maintained against several defendants jointly when each acted independently of the other and there was no concert or unity of design between them; and the tort does not become joint because afterward its consequences

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Argument for Appellants.

united with the consequences of several other torts committed by other persons.

5. *Held*, that if the defendant Dewey, acting for himself, opened up the gates of Lake Ethel reservoir and injured the personal property of the plaintiff, the defendant irrigation district is not liable for such unlawful acts of Dewey; and further *held* that Dewey, having no interest whatever in said irrigation district, could not be held personally liable for the damages done on account of seepage from said system.

6. *Held*, under the evidence in this case that neither of the defendants could be held liable for damages resulting from natural floods flowing down said Mason creek valley.

7. *Held*, that the giving of instructions Nos. 3, 4 and 9 was reversible error.

8. *Held*, that the denial of defendant Dewey's motion for a nonsuit was error.

APPEAL from the District Court of the Seventh Judicial District for Canyon County. Hon. Ed. L. Bryan, Judge.

Action to recover damages alleged to have been caused by the illegal and malicious acts of the defendants. Judgment for the plaintiff. *Reversed*.

H. E. McElroy, Scatterday & Van Duyn and D. Worth Clark, for Appellants.

As to seepage, we contend that the complaint does not state facts sufficient to constitute a cause of action, because no negligence or carelessness in the construction or maintenance of said canal or reservoir is alleged. (*Fleming v. Lockwood*, 36 Mont. 384, 122 Am. St. 375, 92 Pac. 962, 13 Ann. Cas. 263, 14 L. R. A., N. S., 628.)

Instruction No. 9 which clearly was to the effect that the jury had the right to award exemplary damages and not only against one defendant, but against both, and permitted them to jointly assess the exemplary damages, although each defendant acted separately, is erroneous. (*Nightingale v. Scannell*, 18 Cal. 315; *City Water Power Co. v. Fergus Falls*, 113 Minn. 33, Ann. Cas. 1912A, 108, 128 N. W. 817; *McCarroll v. O'Connell*, 7 Cal. 152; 38 Cyc. 1161.)

Argument for Respondent.

The defendants could not be held liable on account of the manner of construction of the ditch or reservoir, because it had existed for such a period prior to the time that plaintiff purchased the land in question that no liability could exist on account of the construction or maintenance of the same, even if a proper allegation had been made. (*St. Louis & S. W. R. R. Co. v. Long*, 52 Tex. Civ. App. 42, 113 S. W. 316.)

The plaintiff wholly failed to prove the joint cause of action alleged, and we claimed a peremptory instruction, disposing of the case under the authority of *Livesay v. First National Bank of Denver*, 36 Colo. 526, 118 Am. St. 120, 86 Pac. 102, 6 L. R. A., N. S., 598, where the court held that "a failure to prove joint liability of persons charged as joint tort-feasors is a failure to prove the cause of action alleged." (*Mau v. Stoner*, 15 Wyo. 109, 87 Pac. 434, 89 Pac. 466.)

Defendants cannot be required to pay loss for which they are not responsible. (*Müller v. Highland Ditch Co.*, 87 Cal. 430, 22 Am. St. 254, 25 Pac. 550.)

Griffiths & Griffiths, for Respondent.

The amended complaint alleges acts of negligence on the part of defendants in causing water to both seep through and flow over and injure the property of plaintiff. (3 Kinney on Irrigation and Water Rights, pp. 3087-3089.)

The construction of irrigation works in such a place and manner as to cause seepage in such manner and quantity as to damage other lands without providing proper and adequate drainage to prevent the damage is of itself negligence. (*Howell v. Big Horn Basin Colonization Co.*, 14 Wyo. 14, 81 Pac. 785, 1 L. R. A., N. S., 596.)

A prescriptive right to act negligently cannot be acquired, no matter how long practiced. (3 Kinney on Irrigation and Water Rights, pp. 3084, 3085.)

It is not necessary that the acts of tort-feasors should be but a single act, or joint, or should not be separate as to place and time, in order to render the parties liable jointly; but

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if they culminate in producing a nuisance which injures the person or property of another, or if their concurring negligence occasions the injury, then they are jointly and severally liable in the highest degree. (*Müller v. Nor. Pac. Ry. Co.*, 24 Ida. 567, 135 Pac. 845, 48 L. R. A., N. S., 700; *Hillman v. Newington*, 57 Cal. 56; *Slater v. Mersereau*, 64 N. Y. 138; 38 Cyc. of Law & Proc. 488, and notes; *City of Valparaiso v. Moffitt*, 12 Ind. App. 250, 54 Am. St. 522, 39 N. E. 909; *Allison v. Hobbs*, 96 Me. 26, 51 Atl. 245; *Corey v. Havener*, 182 Mass. 250, 65 N. E. 69; *Green v. Davies*, 100 App. Div. 359, 91 N. Y. Supp. 470; *Strauhal v. Asiatic S. S. Co.*, 48 Or. 100, 85 Pac. 230; *Day v. Louisville C. & C. Co.*, 60 W. Va. 27, 53 S. E. 776, 10 L. R. A., N. S., 167; *Olsen v. Upsahl*, 69 Ill. 273; *Blanchard v. Burbank*, 16 Ill. App. 375; *Drake v. Kiely*, 93 Pa. 492; *Walker v. Read*, 59 Tex. 187; *McFadden v. Schill*, 84 Tex. 77, 19 S. W. 368; *Gerhardt v. Swaty*, 57 Wis. 24, 14 N. W. 851; *Cuddy v. Horn*, 46 Mich. 596, 41 Am. Rep. 178, 10 N. W. 32; *Kirby v. Del. & H. Canal Co.*, 90 Hun, 588, 35 N. Y. Supp. 975.)

“Where the principal commands the wrong to be done, and therefore personally participates in it, the two may be sued jointly. They are in no different position than any other joint tort-feasors. If there are two or more principals, one or all or any number may be joined.” (Huffcut on Agency, 2d ed., p. 266; *Weber v. Weber*, 47 Mich. 569, 11 N. W. 389; *Hamlin v. Abell*, 120 Mo. 188, 25 S. W. 516; *Stiewel v. Borman*, 63 Ark. 30, 37 S. W. 404; 10 Cyc. of Law & Proc. 920, 931, 933; *Crane v. Onderdonk*, 67 Barb. (N. Y.) 47.)

SULLIVAN, C. J.—This action was brought to recover damages resulting from an alleged trespass on real and personal property by flooding and seepage from the canal system of the defendant, the Nampa & Meridian Irrigation District.

This is a companion case to *Doran v. Dewey et al.*, post, p. 25, 146 Pac. 1124, which was orally argued by respective counsel with the case at bar. These two cases involve practically the same questions of law and fact, although the

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alleged damages occurred to different tracts of land and different personal property.

The respondent in this case alleged, among other things, in his amended complaint, that he was the owner of twenty-one acres of land situated on Mason creek flat, about two miles northeast of the city of Nampa, and that he had this tract in a good state of cultivation and had growing thereon about 900 apple trees, 300 peach trees, 50 cherry trees, 200 grape vines, berry bushes and shrubbery, all of which, as well as certain personal property, was destroyed by reason of the flooding of said land and seepage from the Nampa & Meridian Irrigation District system, and that the whole loss sustained aggregated \$38,815.40; and prayed for damages for that sum.

A demurrer to said amended complaint was overruled and the defendants answered. The case was thereafter tried to a jury and a verdict was returned in favor of the plaintiff in the sum of \$8,315.40, and judgment was entered for that amount. A motion for a new trial was interposed and denied, and this appeal is from that order and from the judgment, as well as from an order of the court taxing costs.

Eight errors are assigned, which go to the action of the court in overruling the appellant's demurrer to the amended complaint and defendants' motion to strike from the amended complaint certain portions thereof; the overruling of defendants' motion to tax costs; the giving and refusing to give certain instructions; the denying of defendants' motion to strike out certain parts of the testimony, and the denying of the motion of defendant Dewey for a nonsuit.

The following facts are disclosed by the record:

The land of the plaintiff is situated in the midst of what is known as Mason creek flat, about two miles nearly north of the town of Nampa. The valley slopes from the south to the north at from ten to fifteen feet to the mile. The Mason creek valley is only about one-third of a mile from Indian creek, at a point near Lake Ethel. The Mason creek basin

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receives the surface drainage from several thousand acres of land. Said creek rises some ten or fifteen miles southeast of the land of plaintiff and runs in a northwesterly direction to Boise river, and is the natural drainage channel for said basin. The land of the plaintiff is located in the Pioneer Irrigation District and is irrigated from the Phyllis canal, which passes easterly and southeasterly of plaintiff's land at a distance of about a mile. The Nampa & Meridian irrigation District adjoins or is near the Pioneer Irrigation District on the south. Its canal system consists of the main Ridenbaugh canal, which crosses Mason creek basin about five miles southeast from plaintiff's land, together with the high-line canal crossing the same basin still higher up. Next above this is what is known as the New York canal, or the canal of the United States Reclamation Service. The reservoir known as Lake Ethel is an artificial lake made by means of a dam in Mason creek about one and a half miles above plaintiff's land. The channel of Mason creek is through Lake Ethel, which covers about twenty-three acres of land and holds water to the average depth of about four feet and when full holds about 112 acre-feet of water. Plaintiff's land is situated in the level basin or channel of said creek, which channel terminates about three-fourths of a mile above plaintiff's land, and the channel again begins at about a mile below plaintiff's land. Thus for about a mile and three-quarters there is no natural channel across said basin, and the water coming to the upper end of said basin or flat must either seep or percolate into the soil, or, if it comes in large quantities, overflow the basin and spread out over the entire Mason creek flat and flow on down the valley to the point where the channel begins again.

Much of the land in this vicinity has been irrigated for some fifteen or twenty years from the said Phyllis canal, while lands farther up Mason creek valley have been irrigated for fifteen years or more from the Ridenbaugh canal, while thousands of acres of new land, naturally draining into Mason creek or valley, have been placed under cultivation

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during the four or five years preceding the trial of this action, by water from said New York canal.

The topography of the locality of said Mason creek valley or basin was shown by several maps introduced in evidence, and by oral testimony on the trial. Said basin or valley is subject to natural floods from rain and snow in the winter, and in the summer a large amount of waste water runs off from and percolates the irrigated land situated in said basin.

As above stated, the maximum capacity of Lake Ethel reservoir is 112 acre-feet of water, and the water from that reservoir is not used for irrigation purposes. If the entire contents of said Lake Ethel were spread out over the surface of Mason creek flat, it would cover it to about a depth of two and a half inches, which is a less amount of water than is ordinarily used by the average Idaho farmer on his land at a single irrigation.

The original complaint in this action was substantially a copy of the complaint in the case of *Doran v. Dewey et al.*, but the amended complaint alleges the turning out of water into Mason creek directly from the canal of the defendant corporation, as well as from said Lake Ethel. The answer of the defendants denied turning out water into Mason creek, either from the canal system or from Lake Ethel, except on January 13, 1912, and denied that any injuries resulted on that occasion. Paragraphs 3 and 4 of defendants' answer set forth in detail their contention in this case, and it is there averred that the land of plaintiff, together with the improvements constituting realty, such as orchard trees, shrubbery, etc., is being gradually destroyed by the underground seepage waters unavoidably resulting from the lawful use of water for irrigation in said Mason creek basin, and that in any event defendants could only be held liable for the part of such injury resulting from an unlawful flooding by the defendants wholly independent of the common injury resulting from seepage from other sources, which, it is contended, plaintiff must prove by competent evidence; that if defendants or any land owner or canal owner in Mason creek basin unlawfully turns out water so as to injure the land of plain-

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tiff, the law affords plaintiff a sure remedy by injunction, and that the only practical remedy for injury from underground seepage waters resulting from the lawful use of water for irrigation is by drainage.

The amended complaint charges a trespass by the defendants from February, 1910, to November, 1912. The evidence shows two surface floodings of the land in Mason creek flat in the month of February, 1910, one in the month of October, 1911, and one about January 13, 1912. It is not contended that from February, 1910, to November, 1912, there were any surface floodings except those above mentioned. An injunction was asked and on that question the trial court made the following findings:

“That the land of plaintiff is situated in what is known as Mason creek basin, which is comparatively flat and level, with an incline or fall of from ten to fifteen feet to the mile, through which the natural drainage of said Mason creek passes; but that the said land of plaintiff is not situated in the lowest part of said basin. That said Mason creek is the natural drainage channel for a large area of land situated above the land of plaintiff, and has a channel over a portion of its course, but has not now and never did have a natural channel or defined course or banks over the land of plaintiff or in the vicinity of plaintiff's land.

“That said Lake Ethel is an artificial lake or reservoir constructed in the bed of Mason creek at a point approximately one mile above and south of the land of plaintiff.

“That the surface of the water under the said land of plaintiff eight years prior to the commencement of this action was forty feet below the surface of the ground and at the time this action was commenced was from sixteen to thirty inches below the surface of the ground on plaintiff's land.

“That the defendant, the Nampa & Meridian Irrigation District and its predecessors in interest, have maintained, operated and used said Ridenbaugh canal system for diverting waters from their natural channels and distributing portions of the same for irrigation and discharged portions into Mason creek, and have maintained water in Lake Ethel and

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discharged water therefrom for a period of more than twenty years.”

Those findings of the trial court and the evidence in the case clearly show that defendant Dewey had no interest, estate or title in the Ridenbaugh canal system, which system is owned and controlled by the Nampa & Meridian Irrigation District, Dewey's codefendant, and there is no evidence contained in the record to sustain or prove the following allegation of the complaint, to wit:

“That during the years 1910, 1911 and 1912 defendants so operated, managed and controlled said canal and reservoir as to continuously divert from their natural channels and carry to and discharge into said Mason creek basin large quantities of water and to store and maintain within said reservoir large portions of said waters, and carelessly, wrongfully and wilfully failed, neglected and refused to provide and maintain proper, adequate or reasonable drains and waste-ways for the proper or reasonable control of said waters,” etc.

It appears from the evidence that Daniel A. Barker, a witness on behalf of the defendants, testified that he was managing director of the Nampa & Meridian Irrigation District, and that he had been director of that district for six years prior to the trial of this case and was manager of the district for three years prior to the trial of the case. In response to the following question he testified as follows: “Q. Explain the circumstances under which the water was turned out of Lake Ethel in the month of January, 1912? A. The country was covered with a heavy fall of snow; we expected a very heavy run-off of surplus water, and amongst other precautions to guard against damage by this water I suggested to Mr. Dewey over the telephone that he let the water gradually out of the lake in advance of this expected flood, and suggested to him that he take out one board at a time and let that water drain out, and then take another out.”

Mr. Henry, who was in the employ of Mr. Dewey, testified that under the instructions of Mr. Dewey he proceeded to take out some of the boards of the gate for the purpose of lowering said lake, and testified: “One day he [Dewey] told

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me to drain it and I didn't drain it until the next day, and he got quite emphatic the next time; he called me up over the phone and told me, 'You had better drain it,' he said 'The people below would be flooded out if we don't let the water low enough down so as to catch the surplus . . . water that came down,' " and told Henry to let the water out gradually.

The evidence in this case shows that Dewey had the boards of the gate taken out at the request of the general manager of said irrigation district and that he and said general manager did not act maliciously in having said work done, and that it was done under direction of the manager of the irrigation district and not by Dewey on his own behalf.

The court in its findings of fact found that the defendant, the Nampa & Meridian Irrigation District, and its predecessors in interest, had maintained, operated and used said Ridenbaugh canal system for diverting waters from their natural channels and distributing portions of the same and discharging portions into Mason creek, and maintained water in Lake Ethel and discharged water therefrom for a period of more than twenty years; but it nowhere finds that Dewey did any of those acts or had any interest therein or performed any of the acts there referred to. The court further found that during the period between February 8, 1910, and November 11, 1912, said irrigation district so operated, managed and controlled said canal system as to continuously divert from their natural channels certain waters and to discharge them into Mason creek basin to the damage of the plaintiff; and the court further found that the defendant Dewey caused the outlet of said reservoir to be opened and caused the contents of the same to flow down upon the plaintiff's land during the summer months of the years 1910 and 1911, and that on or about the 12th or 13th of January, 1912, said Dewey caused a large amount of water stored in Lake Ethel to be turned out into the bed of Mason creek, which flowed down upon the lands of the plaintiff.

It will be observed from the last-mentioned finding that Dewey personally did the acts there stated, and then the court arrives at the remarkable conclusion that "Defendants

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wrongfully and unlawfully caused plaintiff irreparable injury and great damage and loss." The theory of the trial court evidently was that because the irrigation district owned, maintained and operated said canal system, and that Dewey personally turned some water out therefrom, both were guilty alike for the damages alleged to have been sustained by the plaintiff. The acts which the court found that Dewey did were specific trespasses, and the seepage resulting from said canal system was a continuous act disassociated from the specific acts which Dewey did. They are all joined together by the trial court, and both defendants are held liable for the acts of Dewey and for the seepage resulting from said system.

It is contended by counsel for appellant that respondent in his complaint attempts to allege a joint cause of action for damages from seepage against Dewey and the irrigation district, knowing that Dewey had no interest, estate or title in said reservoir and said irrigation system and could not be liable for the defects in its construction, and that the court erred in admitting in evidence a conversation that the plaintiff and others claimed to have had with defendant Dewey several years prior to the commencement of this action and prior to the date when the appellant district owned said canal and irrigation system, and at a time when defendant Dewey had nothing whatever to do with said system himself. This testimony was admitted over the objection of the defendant, and counsel for respondent comments upon this evidence as showing the malicious conduct of said Dewey, and thus attempts to base thereon a claim for punitive damages against the irrigation district as well as against Dewey.

It was clearly error for the court to admit such testimony for any purpose whatever. The plaintiff should not be permitted to include as a joint tort-feasor one whose relation to the alleged trespass could not be joined, since he was not liable personally for the defective construction of said canal system and could not be liable for damages for seepage therefrom. While the defendant Dewey would be personally liable for his own torts, the facts in this case show that he was not liable for any negligent or faulty construction of said

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canal system, as he had no interest or estate in it, since it was the property and under the control of his codefendant.

It was held in *Livesay v. First National Bank*, 36 Colo. 526, 118 Am. St. 120, 86 Pac. 102, 6 L. R. A., N. S., 598, that a failure to prove a joint liability of persons charged as joint tort-feasors is a failure to prove the cause of action alleged, and it is stated in said opinion as follows:

“The great weight of authority supports the principle that where two or more parties act each for himself and independently of each other in a proceeding the results of which may be injurious to another, they cannot be jointly held liable for the acts of each other.”

The great weight of authority is that an action at law for damages cannot be maintained against several defendants jointly when each acted independently of the other and there was no concert or unity of design between them, and it is held in such case if the tort of each defendant was several when committed, it does not become joint because afterward its consequences united with the consequences of several other torts committed by other persons.

In *Miller v. Highland Ditch Co. et al.*, 87 Cal. 430, 22 Am. St. 254, 25 Pac. 550, the court said, in referring to this rule: “If it were otherwise, say the authorities, one defendant, however little he might have contributed to the injury, would be liable for all the damage caused by the wrongful acts of all the other defendants; and he would have no remedy against the latter, because no contribution can be enforced between tort-feasors.” And numerous authorities are cited in support of that rule.

Blaisdell v. Stephens, 14 Nev. 17, 33 Am. Rep. 523, is a case where several defendants were sued for wrongfully flowing waste water from their lands to the injury of plaintiff's ditch and for an injunction to restrain such wrongfully flowing of waste water. It appeared in that case, however, that the defendants owned and irrigated separate and distinct tracts or parcels of land, each in his own right, and they moved for a nonsuit upon the ground that it did not appear that the injury complained of was the result of the joint or

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concurrent acts of defendants. The trial court overruled that motion and on appeal the supreme court of Nevada held that the court erred in not sustaining said motion, and said: "The general principle is well settled that where two or more parties act, each for himself, in producing a result injurious to plaintiff, they cannot be held jointly liable for the acts of each other."

In the case at bar, the result of the destruction of plaintiff's land and orchard trees by seepage from the defendants' irrigation system and from seepage from the irrigated lands surrounding the plaintiff's, resulting in a rising water-table, was not damage caused by the joint acts of Dewey and the irrigation district. If Dewey acting for himself opened up the gates of Lake Ethel reservoir and injured the personal property of the plaintiff, the irrigation district could not be held liable for that unlawful act of Dewey; and neither could Dewey be held liable for damages done on account of seepage from said canal system.

The defendants filed a joint answer in this case, denying the most of the material allegations of the complaint, but that does not make them jointly liable. It was held in *Mau v. Stoner et al.*, 15 Wyo. 109, 87 Pac. 434, 89 Pac. 466, that defendants having filed a joint answer did not preclude them from taking advantage of the fact that the proof did not establish the joint liability charged in the complaint.

If the appellant district negligently permitted seepage from its system which caused damage to the plaintiff, under the evidence in this case, defendant Dewey could not be held liable therefor, and the irrigation district could not be prejudiced or bound by any of the alleged conversations had with the defendant Dewey, since it does not appear that Dewey was authorized to speak for the district in said conversations. Some of the conversations introduced in evidence occurred before the irrigation district owned or had any control of said irrigation system.

The natural floods occasioned by rain and snow in the Mason creek drainage basin and watershed, which contains approximately 10,000 acres, necessarily run into Lake Ethel

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and from thence down the Mason creek channel to the flat or basin in which the land in controversy is situated, and on the upper end of this flat the flood waters must spread out and run over it since there is no channel across the flat to carry such water.

The plaintiff testified that his land adjoins that involved in the Doran case and that he had lived there eight years, and that there had been several floods during that time. Another witness testified that the annual floods caused by snow and rain came down Mason creek six years out of the nine that he had been there and that the flood water ran through Lake Ethel since that was its natural channel. Another witness testified that he was manager and assistant manager of the Ridenbaugh canal from 1890 to 1901, and that he built the dam across Mason creek creating Lake Ethel in 1890 and 1891; that he has been acquainted with it since, and that it was subject to overflows, from floods coming down Mason creek in the winter time. Another witness testified that he had looked after the Ridenbaugh canal for eighteen years and that during that time there had been four big floods in the Mason creek valley besides the water that came down every winter whenever there were snows and rains, and that the management of that canal favored the Mason creek basin by carrying all the flood waters that their canals would carry into Indian creek, thus relieving Mason creek from a part of the flood waters that would have otherwise naturally flowed therein.

The Ridenbaugh canal crosses the valley about six miles above plaintiff's land, and all the flood waters from below said canal would flow down Mason creek regardless of said canal. Lake Ethel and the Ridenbaugh canal system were constructed long prior to the time that the appellant, the Nampa & Meridian Irrigation District, purchased it in 1906.

As regards the floods, the plaintiff testified that he first knew of a flood coming down that creek from snow or rain in January, 1909, and it went all over the place—spread out over his land; that in 1910 the same thing happened in the month of February; that at that time there was a break-up in

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the weather and when the water from Mason creek came down in a flood and got to the upper end of the flat in which his land is situated, it spread out over the land; that two such floods came down in February, the first on the 8th and covered that basin to a depth of five or six inches, and the second came down on the 24th and at that time there was considerable melted snow—there was quite a thaw and the flood was in excess of the capacity of the ditch known as the Beet Sugar Drain ditch.

Another flood occurred on January 13, 1912. Anticipating a heavy flood from the melting of the great amount of snow then lying on the ground, being about sixteen inches deep, the general manager of the appellant corporation, as above stated, requested the defendant Dewey to have the lake opened up and a part of the water drained off, which was done as above stated. And the water thus let out of Lake Ethel flowed down Mason creek and intermingled with the snow. The weather became suddenly colder and froze the snow and water and damage was done to certain personal property belonging to the plaintiff. It appears from the evidence that the general manager of the irrigation district acted in perfect good faith in this matter, believing that a big flood was about to occur, but on account of the change in the weather, certain damage was done to personal property belonging to the plaintiff. The irrigation district admits its liability for such damage and offered at the opening of the trial to permit judgment to be taken against it for the sum of \$1,001. The evidence shows, however, that the headgate of Lake Ethel was opened up under the direction of the general manager of the Nampa & Meridian Irrigation District, anticipating a heavy flood, and it clearly shows that it was not maliciously done for the purpose of injuring the defendant or any other person, but was done with the intention of protecting him and other settlers in the basin, as far as possible, from the disastrous effects of a pending flood.

The evidence also shows that the Idaho-Utah Sugar Company was responsible for the breaking of its reservoir and the flood occurring in October, 1911, and promptly settled

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with the plaintiff for the damages which he sustained. The floods of February, 1910, were primarily caused by melting snows and rains and some water from Lake Ethel when the reservoir was opened to let the flood waters pass down the creek after overflowing the reservoir. The evidence clearly shows that the floods occurring in the winter season were quite a common occurrence prior to the period charged in the complaint, yet it is not claimed that the plaintiff's orchard suffered any injury from them. That, however, was before the water-table had risen near the surface of the ground. The period charged in the complaint is made to correspond to the precise time when the water-table had risen, and it was then only a question of time when the roots of plaintiff's fruit trees would be destroyed, as they were submerged in water a great deal of the time.

It was estimated by expert witnesses that the loss of water from irrigation in that region of country is about one-half of the water used; that about one-half is lost in subsoil and surface run-off. In that basin where the loss from irrigation is by underground seepage or surface run-off, it all flows into the Mason creek flat or basin and contributes to the water-table, except such part thereof as is carried off by waste ditches or evaporates.

When the Mason creek valley was first settled and until about eight years prior to the trial of this action, those digging wells had to go about forty feet from the surface to get water. From that time on to 1910, the water-table kept gradually rising until in 1910 water appeared to within about sixteen inches of the surface, and during that period the area of irrigated lands was greatly increased, as well as the amount of water used for irrigation, and the record clearly shows that the water-table kept rising in accordance with the amount of water used for irrigation. Almost every year, or perhaps six years out of nine, for the past twenty years quite heavy snows or rains have fallen in said basin and great floods of water from rain and the melting of the snows have inundated said valley almost every winter or spring. It is a significant fact that the water did not begin to rise to any perceptible extent

on account of such storms until the irrigated lands and use of water had greatly increased.

Civil Engineer Milligan, a witness on behalf of the plaintiff, testified that he had lived in the Mason creek basin since April, 1899, but not in the lowest part of the basin; that the water-table then at his place was from thirty-two to thirty-five feet below the surface of the land, and at the time this case was tried it was about ten feet from the surface. "Q. During what time has the water-table been rising? A. It has been rising gradually seven or eight years as the land above has come into irrigation. Q. And the rise of the water-table has not been confined to the bottom, has it, of the Mason creek basin? A. No, sir. Q. It has been rising all over that country? A. Wherever irrigation is above the land it seems to be filling up."

It thus appears from the testimony of plaintiff's own witness that the water-table has come up gradually for seven or eight years, and that such rise of the water-table has not been confined to the bottom of Mason creek basin, and that the rise in the water-table is occasioned partly, at least, by the increase in the irrigation of the land in that basin.

Witness Sloan testified in part as follows: "Q. Now, as a source of the water in the water-table, I will ask if the use of water by irrigation in an irrigated community is not the greatest source of the supply of water in the water-table of the community, referring to the Boise Valley, Idaho. A. Yes, it is. Q. I will ask whether the snowfall does not materially contribute to the water in the water-table from your actual experience. A. Yes."

When said witness, who is an experienced drainage engineer connected with the U. S. Department of Agriculture, first examined the water-table in said Mason creek flat in July, 1911, it was about sixteen inches from the surface. He testified that said water-table extended over the lower portions of said valley, also that he was familiar with the irrigation canals and irrigated lands in said basin and had examined the topography of the country, and testified that in his

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opinion the cause or sources of the water supply in the water-table under the land of plaintiff is the seepage from the canals and reservoirs above said land and the irrigation of the lands about it, and that it is practically impossible to operate those canals and reservoirs without some seepage loss, and that it is not practicable to irrigate lands without seepage losses; that, in his opinion, from twenty to forty per cent of the water used for irrigation in said basin goes into the subsoils as seepage from irrigation, and that the greatest source of supply of seepage water in said basin is in the irrigation of the lands. He testified that said water-table could be lowered by drainage and thus remove the surplus water; that there were about 8,000 acres in the Mason creek watershed that could be drained by the same system, and that he had estimated that the amount necessary to construct such a drainage system would be about \$8.50 per acre; that said investigation was made partly at the request of some of the land owners while the witness was in the employ of the government, and that it was not made for any of the defendants in this case.

Engineer Horne testified that there was some loss of water from seepage from all of the canals in that region, and that the water turned on to irrigated land is largely lost, some of it being taken up by plant life, some of it by evaporation and some of it by seepage into the ground.

Pittinger, a witness on behalf of the plaintiff, testified that he had a conversation with Horton, the superintendent of the Nampa & Meridian Irr. District, over the phone, and he testified as follows: "We had a heavy fall of snow on at that time. He told me to look out; they were going to turn 2,500 inches more out. I told him we had all the water we wanted down there now and he had better take care of it himself. He said he could not do it; that it would break the bank of the ditch if they did not turn it out. They had to let go of it." He also testified that it took a day and a night to empty Lake Ethel. The following question was propounded to him. "Q. If from the 8th of February to March 1st there was a continuous stream of water running out of Lake Ethel on to

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Mason creek flat, there must have been some cause for it above the lake? A. Yes, sir; very evidently there was."

From the evidence it appears that there was a general flood condition in that region of country from the 8th of February to about the 1st of March, and this is fully corroborated by the Weather Bureau report for the month of February, 1910. The following is from page 4 of said report, which was introduced in evidence:

"The winter of 1909-10 in the valleys and open plains in southern Idaho was the severest in point of almost continuously low temperature that has occurred in many years. The ground over large areas remained frozen for several months, and snow accumulated to considerable depths, where the ground is ordinarily bare, except at intervals. The low temperature continued until about the 23d of February, when a marked change to warmer occurred, attended by rain and wind. Under the influence of the warm wave, assisted by the wind and rain, the snow on the plains and foothills and in the lower valleys melted very rapidly. The ground, being frozen, was not in condition to absorb any considerable part of the moisture, hence most of it found its way into the streams at once, causing many of the smaller ones to overflow their banks, and resulting in unusually high water in some of the larger ones. Indian creek, which drains a large area of relatively low-lying country in Ada and Canyon counties, and is ordinarily an unimportant stream, went out of its banks on the 28th at Nampa and Caldwell, inundating considerable portions of both towns, causing some damage and much inconvenience. The electric lines running from Boise to these towns were unable to maintain regular schedules for several days. About the same time the Oregon Short Line railroad track was washed out by the overflow of flats and small streams at a number of places in Elmore, Ada, Twin Falls and Cassia counties, and, as a result, traffic was suspended for about two days and seriously impeded for several days more. The cost of repairs was considerable. The Twin Falls canal in Twin Falls county was damaged seriously and many roads and bridges were washed out in that section.

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The heavy flow of water from the foothills flooded some of the streets of Boise, filling cellars, but doing little permanent damage. The total damage in the southern part of the state was probably \$100,000. The water was still high at the close of the month."

It is clear from the record that the water in Lake Ethel did not cause the floods occurring from the 8th of February to the first of March in that region, and no water was running in the Ridenbaugh canal at that season of the year from the river.

Witness Pittinger also testified that a flood in said Mason creek basin to a depth of fifteen inches to two feet would run off if it quit coming in twenty-four to thirty-six hours. He also testified that the water commenced coming down on the 8th of February and kept coming and did not cease until about the 1st of March,—that it was coming practically all of the time from the 8th of February to the 1st of March.

It is clear from the evidence that the water in Lake Ethel contributed but very little to the floods occurring from the 8th of February to the 1st of March, 1910; that those floods were caused from rain and snow and could not have been caused by letting out the water stored in Lake Ethel, since it held only 112 acre-feet of water and could be drained in from twenty-four to thirty-six hours.

It is clear from the evidence that said water-table was not perceptibly raised by the floods caused by the snow and rain, but was raised principally from the seepage from irrigated lands and the canals crossing said Mason creek basin.

The evidence conclusively shows that the killing of the trees in the orchard of appellant was principally caused by the waterlogging of the land—the rising water-table—caused by irrigation and not by letting the water out of Lake Ethel, nor by the floods caused by the rain and snow of that region, for which floods neither defendant was liable.

A section of one of the apple trees grown in said orchard was introduced as an exhibit on the trial, and it shows that the bark was split longitudinally and was in the process of healing over. The exhibit itself showed that the split had oc-

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curred several years before 1910, and the evidence shows that this might have occurred from different causes. The plaintiff himself testified in regard to the flood of 1910 and the freezing of the water and as to what he thought killed his orchard trees, and he stated that it was not the bursting of the bark alone that killed them, but that helped some, and he believed it was the floods and the seepage that killed his orchard; that he supposed the wounds made on the tree by the splitting of the bark would have healed had it not been for the seepage or the rising of the water-table. This orchard was eighteen or twenty years old, and the floods that came down that basin up to 1910 had not caused the water-table to rise or injured the orchard in any way, so far as the evidence shows, and it is clear that said orchard was injured but very little by any cause except the rising of the water-table of said basin caused by the seepage from irrigated lands and the canals crossing said Mason creek watershed.

The defendant Dewey is not personally liable for the maintenance and operation of said canals or reservoir and was not liable in any way for the seepage occurring therefrom.

The fact that Dewey was president of the board of directors of said irrigation district would not make him personally liable for any damage arising from the operation of said canal, even though such operation were negligently done. Whatever damage the plaintiff sustained to his personal property by reason of Lake Ethel having been emptied of its water, under the direction of the proper officers of the irrigation district, Dewey would not be personally liable for, unless he, as an officer, maliciously had it done; but the Nampa & Meridian Irrigation District would be liable if it had negligently emptied said reservoir and injured the property of the plaintiff. If Dewey, on his own account, had the boards in said headgate removed and let the water out of Lake Ethel to the injury of plaintiff's personal property, he would be personally liable for such injury, and his codefendant, the irrigation district, would not be liable therefor. If Lake Ethel was emptied by direction and under the authority of the irrigation district, Dewey would not be per-

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sonally liable for any damages done thereby. The seepages from the reservoir and canals, and from the irrigated lands, if trespasses, were entirely disassociated from the acts alleged to have been done by Dewey; and yet the personal acts alleged, or shown by the evidence, to have been done by Dewey are all joined together in this action with the seepage of water from said canal system and the rising of the water-table, and both defendants are held liable under this judgment for their own individual acts of alleged trespass and the individual and personal acts of his codefendant. This was clearly error.

It should be remembered that the channel of Mason creek runs through Lake Ethel reservoir, and when great natural floods came down said channel, the manager of the district endeavored to have the water pass with the least possible injury to the reservoir and the lands below. It was attempted to be shown that the water from said lake inundated the valley from a foot to two feet, when it was established beyond any doubt that the entire capacity of the lake, if filled with water and let out at once, would not cover said valley more than two and a half inches deep. The valley having an incline or fall of about fifteen feet to the mile, the water would soon run off unless it was augmented by rainstorms and melting snows, which the evidence clearly shows was the case.

In lowering the lake, the evidence shows that the water was gradually drained out; and to hold the defendant Dewey liable for damage caused by the rising water-table, even if it be conceded that that was caused by seepage from said reservoir and canals, would be to hold him liable for something he could not be held responsible for under the evidence, as he does not own or control the operation of said canals and reservoir.

The giving of instruction No. 3 is assigned as error. Said instruction is in part as follows: "You are instructed that the law demands that the owner of an irrigation ditch and works used in connection therewith shall have them properly constructed, managed and operated; and in this case it was the duty of the defendants to so construct, manage, operate

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and control the irrigation canal, reservoir and waste ditch herein described, . . . and if through such intentional fault or careless acts of defendants, if any, in not constructing, managing, operating or controlling said ditches and reservoir, the water therefrom flowed over and upon or seeped in, through and under the lands of plaintiff, and thereby caused damage to plaintiff's said lands or property, the defendants are responsible for such damages as the evidence may show the plaintiff to have actually sustained thereby."

This instruction is clearly error, since the evidence clearly shows that the defendant Dewey personally had nothing to do with the construction, maintenance or operation of said canal, and could not be held liable for the faulty construction thereof or the seepage resulting therefrom.

The giving of instruction No. 4 is also assigned as error. Said instruction is in part as follows: "You are further instructed that if you find from the evidence that defendants caused waters from other sources or channels to be collected by and carried through the Ridenbaugh canal to Mason creek," etc.

This instruction was clearly error, for the reasons above stated in relation to instruction No. 3. There is no evidence that shows that Dewey caused the water from other sources or channels to be collected and carried through the Ridenbaugh canal.

The giving of instruction No. 9 is assigned as error. Said instruction is in part as follows: "You are instructed that in an action for trespass to real estate, such as the one here under consideration, where there are elements of malice, insult or deliberate oppression, exemplary damages may be allowed."

Under the evidence in this case the court ought to have instructed the jury that the evidence would not justify the allowance of any punitive damages whatever. There was no legal evidence whatever of any malice, insult or deliberate oppression in this case. Even if the defendant Dewey were prompted by malicious motives in the acts that he did in the matter, such motives cannot be given in evidence in order to recover punitive damages against the irrigation district. One

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defendant cannot be made liable on account of the malicious motives of his codefendant unless his codefendant is implicated in such malice. (See *Nightingale v. Scannell*, 18 Cal. 315; 38 Cyc. 1161.)

The complaint was evidently drawn upon the theory of joint ownership and operation of said canal system by the defendants and the joint and continuous trespass in certain particulars, and the evidence does not support the theory of joint ownership and operation of said canal system, and does not support the theory of joint or continuous trespass by the defendants.

It was clearly error for the court to give the above instructions.

The denial of defendant Dewey's motion for a nonsuit is assigned as error. The action of the court in that matter was clearly error, since the evidence shows that the defendant Dewey was not responsible for the faulty construction of said canal system and reservoir, if there were any fault in such construction, and was not liable for the operation of said canal and could not be held liable for seepage occurring therefrom.

In our view of the matter, it will not be necessary for us to pass upon the assignment of error directed to the action of the court in overruling the defendants' motion to tax the costs, since a new trial must be granted, and the costs of the trial already had cannot be taxed against the appellants.

Since the judgment must be set aside and a new trial granted, it will not be necessary for us to pass upon the other errors assigned.

The record shows that the court tried the case upon the wrong theory; that it admitted incompetent evidence; gave erroneous instructions, and erred in rendering judgment against the defendants jointly for alleged trespasses that the evidence shows were committed by each defendant separately, and in which there was no concerted action as to time, place or act.

For the foregoing reasons, the judgment must be reversed and a new trial granted, and it is so ordered, and the cause

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remanded for further proceedings in accordance with the views expressed in this opinion. Costs awarded to the appellants.

Budge and Morgan, JJ., concur.

Petition for rehearing denied.

(February 13, 1915.)

G. H. DORAN, Respondent, v. E. H. DEWEY and NAMPA & MERIDIAN IRRIGATION DISTRICT, Appellants.

[146 Pac. 1124.]

APPEAL from the District Court of the Seventh Judicial District for Canyon County. Hon. Ed. L. Bryan, Judge.

Action to recover damages alleged to have been caused by the illegal and malicious acts of the defendants. Judgment for the plaintiff. *Reversed.*

H. E. McElroy, Scatterday & Van Duyn and D. Worth Clark, for Appellants.

Griffiths & Griffiths, for Respondent.

SULLIVAN, C. J.—This case and the case of *Verheyen v. Dewey* and the *Nampa & Meridian Irrigation District*, ante, p. 1, were submitted by respective counsel at the same time for determination by this court, and upon substantially the same arguments. It was agreed that the briefs filed in this case should be used in the *Verheyen* case. Since the facts are quite similar, in fact, almost identical, except the facts in the *Verheyen* case cover an additional year of time, the questions of law in the two cases are practically the same, and the rules

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laid down in the decision of the Verheyen case are applicable to the facts and law covering this case.

Therefore, upon the decision of that case, the judgment in this case is reversed and the cause remanded for a new trial in accordance with the views expressed in the Verheyen case. Costs awarded to the appellants.

Budge and Morgan, JJ., concur.

Petition for rehearing denied.

(March 3, 1915.)

WASHINGTON STATE SUGAR COMPANY, Appellant, v.
JACOB GOODRICH et al., Respondents.

[147 Pac. 1073.]

WATER RIGHT PERMITS—WATER RIGHT CLAIMS—POWERS OF STATE ENGINEER—FORFEITURE OF RIGHT—ACTUAL APPROPRIATION BY USE—COMPLIANCE WITH STATUTE—VESTED RIGHTS—ACTION TO QUIET TITLE—NECESSARY PARTIES—CHANGE IN POINT OF DIVERSION—CHANGE FROM PURPOSE FOR WHICH APPROPRIATED—USE IS MEASURE OF RIGHT—DUTY OF WATER—WHAT DECREE SHOULD CONTAIN.

1. Where a permit to appropriate water for a beneficial use is granted by the state engineer, a total failure to commence the work within the time provided in the permit, or to complete one-fifth of the work within the time limited in the permit, cannot be cured by extending the time within which to make proof of beneficial use of the water so attempted to be appropriated.

2. A water right claim, as filed with the state engineer, is merely a declaration of intention to create a water right. Only by a compliance with the conditions of the permit does the water right claim finally become a water right.

3. Where one obtains a permit for the appropriation of water from the state engineer, a failure to put the water to a beneficial use or to comply with the conditions of the permit is an abandonment of the use.

4. One may obtain a prior right to the use of the water of a stream where he actually diverts and applies the same to a beneficial

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use, although he may never have applied to the state engineer for a permit to do so. (*Nielson v. Parker*, 19 Ida. 727, 115 Pac. 488, cited and followed.)

5. The granting by the state engineer of a permit for the right to use the waters of a stream, in and of itself, secures to the applicant no right to the use of such water, unless there be a substantial compliance with every provision of the statute affecting the issuance of such permit and a fulfillment of the conditions of the permit; a compliance with the conditions and limitations prescribed in the permit initiates a right to the use of the water in the applicant, and said right then becomes a vested one and dates back to the issuance of said permit.

6. A right to the use of water obtained by actual diversion and application to a beneficial use is a vested right, and cannot be defeated by the subsequent issuance by the state engineer of a permit to appropriate such water, granted to another party than the prior appropriator.

7. Where suit is brought by an aggrieved party to review the decision of the state engineer in lieu of an appeal from the proceedings had before said engineer, the action is in the nature of a suit to quiet title, and must be prosecuted and conducted in the same manner as an action to quiet title to real estate, and all parties whose claims are adverse to the plaintiffs, whether they appear before the state engineer or not, are indispensable parties and must be made defendants in the action.

8. Where an application to appropriate water has been made under sec. 3253, Rev. Codes, as amended by Sess. Laws 1913, p. 136, and a permit granted, and the applicant thereafter desires to change the point of diversion, he must substantially comply with the provisions of said sec. 3264, Rev. Codes.

9. The state engineer has no authority to make any change in the point of diversion specified in his permit to appropriate that would in any way interfere with the rights of prior appropriators.

10. In an action to quiet title, plaintiff will not be permitted to rely upon the weakness of defendant's title in order to establish a better title in himself, but if he is entitled to recover at all, it must be upon the strength of his own title.

11. The test of an appropriator's right to water for irrigation is the amount of water actually used for the beneficial purpose claimed.

12. Where one appropriates water for the operation of a sawmill and thereafter appropriations are made from the same stream by several parties for irrigation purposes, the first appropriator cannot transfer his appropriation to another to be used for irrigation

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purposes and thereby defeat the rights of subsequent appropriators for purposes of irrigation.

13. The duty of water depends upon the character and condition of soil, and in determining such duty reference should always be made to lands that have been properly prepared and reduced to a reasonably good condition for irrigation.

14. *Held*, that certain findings of the court were sustained by the evidence.

15. An appropriator of water, after conducting the same to the point of intended use, has a reasonable time in which to apply such water to the use intended, but where the question of proof of such use arises, such appropriator cannot be permitted to anticipate what he might do in the future, or to make additional proof of further application to a beneficial use at a future time.

16. *Held*, that the decree of the lower court must be modified in regard to the amounts of water decreed certain appropriators.

17. In an action to quiet title to water appropriated from a public stream, where the issue joined is one of priority, the court should find the actual appropriation made by each appropriator, the date upon which the appropriation was made and the quantity of water appropriated to a beneficial use by each.

APPEAL from the District Court of the Eighth Judicial District, in and for the County of Kootenai. Hon. R. N. Dunn, Judge.

Action to quiet title to certain water rights in Lewellyn creek. Decree of the lower court modified.

Allen & Allen and Chas. L. Heitman, for Appellant.

The appropriator is not even entitled to the quantity actually diverted and taken into possession, if he uses only a portion of it; his right is limited to the amount so actually used. (*Wiel on Waters*, sec. 168; *Van Camp v. Emery*, 13 Ida. 202, 89 Pac. 752; *Trimble v. Hellar*, 23 Cal. App. 436, 138 Pac. 376.)

An appropriator of water for irrigation purposes has no more than a reasonable time in which to apply water to his land, after conducting it to the point of intended use. (*Ben-net v. Nourse*, 22 Ida. 249, 125 Pac. 1038; *Kirk v. Bartholomew*, 3 Ida. 367, 29 Pac. 40; *Joyce v. Rubin*, 23 Ida. 296,

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130 Pac. 793; *Snow v. Abalos* (N. M.), 140 Pac. 1044; *Trimble v. Hellar, supra.*)

It is well settled that one cannot appropriate merely water enough to irrigate a garden patch and then claim water enough to irrigate a farm. (Wiel on Water Rights, 2d ed., sec. 170; *San Luis Water Co. v. Estrada*, 117 Cal. 168, 48 Pac. 1075; *Conroy v. Huffine*, 48 Mont. 437, 138 Pac. 1094.)

The test being the amount of water actually used by him for a beneficial purpose. (*Hufford v. Dye*, 162 Cal. 147, 121 Pac. 400; *Trimble v. Hellar, supra*; *Hewitt v. Storey*, 64 Fed. 510, 12 C. C. A. 250, 30 L. R. A. 265.)

If respondents attempt to base their claims upon the appropriation and actual application of water to beneficial uses on the part of Hall, Goodrich and Brown, then the amount of water to which respondents are entitled is the amount which they were using at the date of their last act of appropriation and use, at the time when appellant's rights became vested. (*Morris v. Bean*, 146 Fed. 423; *Pyke v. Burnside*, 8 Ida. 487, 69 Pac. 477.) The largest duty and the greatest use must be had from every inch of water in the interest of agriculture and the building of homes. (*Van Camp v. Emery*, 13 Ida. 202, 89 Pac. 752; *Niday v. Barker*, 16 Ida. 73, 101 Pac. 254.)

The question to be determined in such cases is the amount actually necessary for the useful or beneficial purpose to which the water is to be applied. (*Farmers' etc. Ditch Co. v. Riverside Irr. Co.*, 16 Ida. 525, 102 Pac. 481.) And reference should always be had to lands that have been prepared and reduced to a reasonably good condition for irrigation. (*Kirk v. Bartholomew*, 3 Ida. 367, 29 Pac. 40; *Geertson v. Barrack*, 3 Ida. 344, 29 Pac. 42.)

"Water is too precious in this arid climate to permit its being unnecessarily wasted." (*Roeder v. Stein*, 23 Nev. 92, 42 Pac. 867; *Burkhart v. Meiberg*, 37 Colo. 187, 119 Am. St. 279, 86 Pac. 98, 6 L. R. A., N. S., 1104; Wiel on Water Rights 2d ed., pp. 265, 266.)

The place of use can be changed provided no injury be done to others. (*Bennett v. Nourse, supra.*)

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After ten years from the diversion, it will be presumed that the appropriator has cleared all the land he intended to irrigate. (*Senior v. Anderson*, 115 Cal. 496, 47 Pac. 454.)

A cessation of the use by the appropriator works a forfeiture of his right, where there is a failure to make any beneficial use of the water for a period of more than five years, and, in such case, a subsequent appropriator for a beneficial use acquires a right to the water. (*Smith v. Hawkins*, 110 Cal. 122, 42 Pac. 453.)

Under the pleadings the court should have determined the date of each appropriation through which the several parties claim their rights, the amount of water appropriated and applied by each party for useful or beneficial purposes, and ordered judgment to be entered accordingly. (*Geertson v. Barrack*, 3 Ida. 347, 29 Pac. 42; *Kirk v. Bartholomew*, 3 Ida. 367, 29 Pac. 40; *Brown v. Macey*, 13 Ida. 451, 90 Pac. 339; *Lee v. Hanford*, 21 Ida. 327, 121 Pac. 558; *Hufford v. Dye*, 162 Cal. 147, 121 Pac. 400.)

McBee and Beggs had acquired vested rights, and at the time they acquired these rights, there was no statute imposing a penalty of forfeiture, or otherwise, for a failure to commence the work within the time prescribed in the permits, and no subsequent statute imposing such a penalty could interfere with these vested rights, even if made retrospective. (*Nielson v. Parker*, 19 Ida. 724, 115 Pac. 488; *Gard v. Thompson*, 21 Ida. 485, 123 Pac. 497; *Richmond Min. Co. v. Rose*, 114 U. S. 576, 5 Sup. Ct. 1055, 29 L. ed. 273.)

Black & Wernette, for Respondents.

Plaintiff must rely upon its own title in its action to quiet title and not upon the weakness of respondent's title. (*Winter v. McMillan*, 87 Cal. 256, 22 Am. St. 243, 25 Pac. 407; *Robinson v. Muir*, 151 Cal. 118, 90 Pac. 521.)

The junior appropriator has a vested right in the continuance of the conditions that existed on the stream at and subsequent to the time he made his appropriation, unless the

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change can be made without injury to such right. (*Vogel v. Minnesota Canal Co.*, 47 Colo. 534, 107 Pac. 1108.)

One who asserts the right to a change in the place of diversion has the burden of proving that the change will not injuriously affect the vested rights of others. (*Farmers' High Line Canal & Reservoir Co. v. Wolf*, 23 Colo. App. 570, 131 Pac. 294; *Fort Line Canal Co. v. Chew*, 33 Colo. 392, 81 Pac. 37; *New Cache La Poudre Irr. Co. v. Water Supply & S. Co.*, 49 Colo. 1, 111 Pac. 610; *Bowman v. Virdin*, 40 Colo. 247, 90 Pac. 506.)

The appropriator, if he actually diverts the amount of water claimed in his water notice and appropriations, and conducts the same to the lands on which the water was to be used, can have a reasonable length of time, under all the circumstances of his particular case, in which to apply the water to a beneficial use. (Wiel on Water Rights, 3d ed., sec. 483; *Conant v. Jones*, 3 Ida. 606, 32 Pac. 250; *Hall v. Blackman*, 8 Ida. 272, 68 Pac. 19; *Brown v. Newell*, 12 Ida. 166, 85 Pac. 385.)

BUDGE, J.—This is an action brought in the district court of the eighth judicial district for the county of Kootenai, to quiet title to the waters of Lewellyn creek, a small stream rising in the mountains east of the lands now owned and in the possession of appellant and respondents, in this action.

Appellant owns a farm of 2,000 acres, situated about five miles from the point of diversion of appellant company's ditch on Lewellyn creek. When this action was commenced, a considerable portion of this land was in a high state of cultivation. It is arid in character and requires irrigation for its successful cultivation. These lands were partially irrigated from a stream known as Sage creek, not in controversy in this action. Into this creek appellant undertook to convey the waters of Lewellyn creek by means of a ditch, the intake of which is located at or near what is known as Roush's sawmill.

On November 11, 1899, J. C. Roush, by written notice, appropriated and claimed 100 cubic feet of water per second of

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time of the waters of Lewellyn creek. On June 4, 1906, and on July 15, 1907, upon application duly made, the state engineer issued and subsequently approved permit No. 2158 to Edwin McBee and permit No. 2978 to S. E. Beggs, for 25 and 9.6 cubic feet of water per second of time, respectively. On May 17, 1907, McBee assigned to Beggs all his right, title and interest to the use of the waters of Lewellyn creek, under permit No. 2158, and Beggs, thereafter, on September 14, 1908, conveyed the same to the appellant herein, on which date he also transferred to appellant the right to the use of the waters of Lewellyn creek under permit No. 2978; records of which transfers were made in the office of the state engineer, on July 21, 1910. On September 23, 1908, J. C. Roush, by a written conveyance, transferred to appellant all right, title and interest claimed under his appropriation to the waters of Lewellyn creek.

During the month of October, 1908, and subsequent to the date of the purchase of the aforementioned rights to the use of the waters of Lewellyn creek, appellant commenced the construction of the Corbin ditch and flume and prosecuted the work to completion during 1910, or 1911.

Lewellyn creek, from the intake of appellant's canal, runs in a westerly direction through the lands of the respondents, who claim the right to the use of the waters of said creek by reason of the construction of a ditch, known as the Hall-Goodrich ditch, in 1894, diverting the water of said stream to and upon their respective lands, and also by the posting of water location notices and causing the same to be recorded in the county recorder's office of Kootenai county. This diversion and use, as well as the posting and filing of notices of appropriation of the waters of Lewellyn creek, respondents contend was prior to the right, if any, of the appellant and its predecessors.

Lewellyn creek takes its name from Americus Lewellyn, who was the first pioneer to settle in that locality. It is contended that Jacob Goodrich and D. C. Hall located on Lewellyn creek in 1891, and that Goodrich constructed a ditch and

diverted the water to his home for domestic purposes; that in 1894 Hall constructed a ditch connecting with the west end of the Goodrich ditch and carried the water on to his place. This ditch, therefore, became known as the Hall, or the Hall-Goodrich ditch, through which respondents have conducted water for the irrigation of portions of their respective lands. The date of the construction of the ditch, the size of the ditch when constructed, the date of the enlargement of the ditch, its fall and capacity, as well as the actual date of appropriation of the water of the Lewellyn creek and its use by the respective respondents and their predecessors in interest, together with amount of water put to a beneficial use and necessary for the proper irrigation of the lands of the respondents, and the area of lands irrigated by each of the respondents and their predecessors in interest, are involved in this litigation.

The record in this case is voluminous. Appellant's counsel makes twenty-five assignments of error, a number of which are subdivided. We shall not attempt to discuss separately each assignment of error upon which appellant relies for a reversal of the judgment. Appellant bases its right to the use of waters of Lewellyn creek, upon permits Nos. 2158 and 2978; also upon J. C. Roush's appropriation. Permit No. 2978, application of Beggs for 9.6 cubic feet per second of time, of the waters of Lewellyn creek, contains necessary information required under the statutes, describing the lands to be irrigated, the quantity of water claimed, estimated cost of work, description of works for diversion, time required for the completion of the construction of the work and the approval of the state engineer, which permit when approved, was subject to the following limitations and conditions, to wit: "Work to begin on or before October 9th, 1907 and to continue diligently and uninterruptedly to completion, . . . one-fifth of the work above specified to be completed on or before February 10, 1909. The whole of said work to be completed on or before August 10, 1910. The time for proof

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of beneficial use of water appropriated in accordance herewith, to extend to August 10, 1913." Permit No. 2158, which is McBee's application to appropriate 25 cubic feet per second of time of the waters of Lewellyn creek, contains the same conditions and limitations set out in permit No. 2978 and has indorsed thereon the approval of the state engineer on July 28, 1906, and provides that one-fifth of the work specified in the permit shall be completed on or before January 28, 1909; the whole of said work to be completed on or before July 28, 1911. The time for making proof of beneficial use of the water attempted to be appropriated was extended to July 28, 1915.

A comparison of the description of the land to be irrigated as described in the aforesaid permits and the land set out in the appellant's complaint, as owned and sought to be irrigated by appellant, establishes the fact that they are not the same, but entirely different lands.

Sec. 3254, Rev. Codes, as amended by Sess. Laws 1905, p. 361, sec. 2, provides: "Every holder of a permit which shall be issued under the terms and conditions of an application filed hereafter appropriating 25 cubic feet or less per second, must, within 60 days from the date upon which said permit issues from the office of the state engineer, commence the excavation or construction of the works by which he intends to divert the water, and must prosecute the work diligently and uninterruptedly to completion, unless temporarily interrupted through no fault of the holder of such permit by circumstances over which he has no control. . . .

"The holder of any permit who shall fail to comply with the provisions of this section within the time or times specified shall be deemed to have abandoned all right under his permit." Sec. 3257 Rev. Codes, as amended by Sess. Laws, 1913, p. 509, provides: "On or before the date set for the completion of works for the diversion and application of water under any permit, the holder of such permit, or his assigns, shall be prepared to submit proof of the completion of such works to the state engineer. Such holder of such permit shall first

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notify the state engineer that he is prepared to submit such proof of completion of such works.”

It will be seen from an inspection of the McBee and Beggs permits, Nos. 2158 and 2978, respectively, that in the former, one-fifth of the work was to be completed on or before January 28, 1909, the whole of said work to be completed on or before July 28, 1911, and in the latter, one-fifth of the work was to be completed on or before February 10, 1909, and the whole of said work to be completed on or before August 10, 1910. There is no evidence in the record that work was commenced under the McBee and Beggs permits, within sixty days from the date upon which the permits were issued from the office of the state engineer, or that one-fifth of the work specified in said permits and required to be done by the state engineer was done, or that the whole of said work was completed on or before July 28, 1911, and August 10, 1910, as provided in said permits. Neither was there any testimony offered as an excuse for any interruptions with said work under circumstances over which the holder of the permit had no control. Under the McBee permit, proof of the completion of the work should have been made practically two years prior to the commencement of this action, and under the Beggs permit, proof of the completion of the work should have been made approximately three years prior to the commencement of this suit.

The evidence is conclusive that neither McBee nor Beggs, at any time subsequent to the date of the issuance of the permits, even attempted to comply with the conditions therein contained. If there was a compliance with any of the conditions of said permit, it was by appellant when it began the construction of the Corbin ditch and flume connecting the waters of Lewellyn creek with the waters of Sage creek in the month of October, 1908, and this alleged compliance was upon the theory that the statutes, at the time of the issuance of the permit, did not provide a forfeiture by operation of law, until the time fixed in said permit for the submission of proof of beneficial use of the waters appropriated, which time, under

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permit No. 2158, was extended to July 28, 1915, and under permit No. 2978, to August 10, 1913. A total failure, however, to commence the work within the time specified in the permit, or to complete one-fifth of the work within the time limited in the permit, would not be cured by extending the time within which to make proof of the beneficial use of the water so attempted to be appropriated.

The state is the sovereign owner of the right to appropriate and use all of the stream waters which are within the jurisdiction of the state. The state, by enactment of appropriate laws, permits private persons to use its right to appropriate and use the flow of stream water. A water right claim is not a water right. A water right claim is a declaration of intention made in a written form prescribed by statute to give public notice of intention to create water rights identical with descriptions stated in the writing, commonly referred to as a water right. Although they are not, water right claims have become commonly regarded as being the same thing as water rights. One is a mere declaration of intention to create a water right which may never be anything more than an intention. By a compliance with conditions of the permit, the water right claim then becomes a water right. The statute may permit an appropriator to change any or all of the conditions contained in the declaration of intention, except the particular stream from which the diversion is intended to be made, but it could not be successfully maintained that a subsequent appropriator's right to the use of the waters of a stream should be impaired by a change in the declaration of intention to appropriate by the act of the party, or with the consent of the state engineer, or to change the point of diversion. The extent of the permit of the state is measured by the use of the water under the conditions and limitations of the permit. A failure to put the water to a beneficial use or to comply with the conditions of the permit, is an abandonment of the use, and this would be true whether or not there was a statute containing such a provision.

There is another reason equally tenable, that might be urged against the validity of the appropriation attempted to be made

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under said permits, which would estop the appellant from asserting a prior right to the use of the waters of Lewellyn creek as against the respondents: Prior to the commencement of the construction of the Corbin ditch, A. J. Shaw, an agent of the appellant company, and Albert Allen, an attorney for said company, traversed the entire length of Lewellyn creek and made an inspection of the Hall-Goodrich ditch, as well as the various laterals leading from said ditch, to and upon the lands of the respondents, made measurements of the size and capacity of said ditches and the waters flowing therein, and further familiarized themselves with the conditions along said Lewellyn creek and the lands that were then being irrigated by means of these ditches. At the time of said investigation, respondents were residing upon their homesteads, the lands upon which they and their predecessors had lived since about the year 1893, approximately fifteen years prior to the commencement of the construction of the Corbin ditch and canal by appellant. The Goodrich ditch was constructed, as appears from the record, about the year 1889, from the Lewellyn creek down to the lands of some of the respondents. The Hall ditch was constructed not later than 1893, or 1894. The water of said Lewellyn creek was taken down through the Hall-Goodrich ditch to lands now owned by the respondents and used upon the same. On June 19, 1897, Hall recorded with the county recorder of Kootenai county, his notice of appropriation of three cubic feet of water per second of time of the water of Lewellyn creek, and on December 31, 1900, Goodrich and Brown recorded with said county recorder their notice of appropriation, claiming twenty cubic feet per second of time. The evidence, therefore, stands uncontradicted that there had been an actual application of the waters of Lewellyn creek to the lands of the respondents and their predecessors, of which fact appellant had, by reason of the inspection made by its agent and attorney, actual notice prior to the commencement of the construction of the Corbin canal and a record notice of the appropriation of twenty-three cubic feet of the waters of Lewellyn creek by respondents and their pre-

decessors, prior to the issuance of either the McBee or Beggs permits by the state engineer.

We think the facts in this case justify the application of the principle of law announced in the case of *Nielson v. Parker*, 19 Ida. 727, 115 Pac. 488: "Where one actually diverts the water of a stream and applies the same to a beneficial use in the irrigation of his growing crops, although he has never applied to the state engineer for a permit to do so; and has never procured either a permit or a license from the state engineer, still his right is superior and paramount to any right that a subsequent appropriator can procure, even though the latter secures a permit from the state engineer to appropriate and divert the waters of the stream."

The granting by the state engineer of a permit for the right to use the waters of this state, in and of itself secures to the applicant no right to the use of the waters applied for in said permit, unless there be a substantial compliance with each and every provision of the statute relating to or in any manner affecting the issuance of such permit and a fulfillment of the conditions and limitations therein, but a compliance with the conditions and limitations prescribed in such permit initiates a right to the use of the water in the applicant, and said right then becomes a vested one and dates back to the issuance of said permit.

A right, by actual diversion and application of the water of a stream, prior to the issuance of a permit by the state engineer, is a vested one, and cannot be defeated by the subsequent issuance to an applicant, by said state engineer, of a permit for the waters so diverted and put to a beneficial use, or, if it appears that the conditions and limitations of the permit and the statutes governing the issuance of the same, have not been substantially complied with in the diligent prosecution and completion of the work within the time and manner provided by law, and vested rights have accrued by actual diversion and appropriation to a beneficial use of the water attempted to be appropriated under the permit, the actual diversion and application to a beneficial use, entitles the appropriator to a prior right.

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Sec. 3256, Rev. Codes, as amended by Sess. Laws 1909, p. 300, provides: "If the holder of a permit to appropriate the public waters shall fail to comply with the requirements of his permit as to the commencing of work . . . or the completion of one-fifth ($1/5$) of the construction work within one-half ($1/2$) the time allowed for the entire completion of such construction work, or shall fail to complete the entire construction work within the time specified in his permit, said permit may be canceled and voided by the state engineer as hereinafter provided at the instance of any person or persons holding any permit for the diversion of water from the same stream."

It appears from the record in this case that on November 3, 1910, due notice of contest was issued out of the office of the state engineer as provided by sec. 3256, *supra*, directed against McBee, Beggs and the Washington State Sugar Co., notifying them, and each of them, to appear in the office of said state engineer on January 3, 1911, to show cause by affidavit, if any there be, why permits Nos. 2978 and 2158 should not be canceled for a failure to comply with the provisions of said permits; that thereafter, upon a hearing had, it was made to appear to the satisfaction of the state engineer that the terms and conditions of said permits had not been complied with. Thereupon an order was duly made on January 9, 1911, canceling and voiding said permits, from which order no appeal was prosecuted to the district court, or action commenced in said district court in the county where the water was located, to determine the question involved in the proceedings had before the state engineer, as provided under sec. 3256, *supra*, wherein the respondents to this action were made parties.

Where suit is brought by an aggrieved party to review the decision of the state engineer in lieu of an appeal from the proceedings had before said engineer, the action is in the nature of a suit to quiet title, and must be prosecuted and conducted in the same manner as an action to quiet title to real estate, and all parties whose claims are adverse to the plaintiffs, whether they appear before the state engineer or

not, are indispensable parties, and must be made defendants in the action; otherwise a judgment rendered in the district court would not be binding upon adverse claimants, and they would in no way be affected by the proceedings had either before the state engineer or in the district court.

From the record in this case it is clear to our minds that no right was initiated under the McBee or Beggs permits; that the statutes governing the issuance of said permit, as well as the conditions and limitations therein prescribed, were not substantially complied with, either by the appellant or its predecessors, and that the order made by the state engineer on January 9, 1911, canceling permits Nos. 2153 and 2978 was a valid one. Appellant insists that it has a right to change the point of diversion under permits Nos. 2158 and 2978 and also the Roush appropriation. Sec. 3247, Rev. Codes, provides: "The person entitled to the use of water may change the place of diversion, if others are not injured by such change." This section is not in conflict with sec. 3264, which provides, among other things: "That any person owning any land to which water has been made appurtenant either by decree of the court or under the provisions of this chapter [chapter 2, title 9] . . . desiring to change the place of use of such water shall first make application to the state engineer, stating fully in such application the reasons for making such transfer." Such application shall describe the land to be irrigated from the point of diversion different from the one described in the license or permit. Where an application to appropriate water was made under sec. 3253, Rev. Codes (either prior or subsequent to the amendment of said section by Sess. Laws 1913, p. 136), and a permit granted, and the applicant thereafter desires to change the point of diversion, in order to do so it is necessary that a substantial compliance be made with said sec. 3264, *supra*, and unless that statute is complied with, no change can be made. Where one secures a permit under chapter 2, title 9, Rev. Codes, and appropriates water under said permit, it is a statutory appropriation, and any change in the point of diversion is governed by the provisions of the statutes.

In the case of *Farmers' High Line Canal & Reservoir Co. v. Wolf*, 23 Colo. App. 570, 131 Pac. 291, the court said:

"As against the change sought by petitioners, the junior appropriators had a vested right in the continuance of the conditions that existed on the stream at and subsequent to the time they made their appropriations, unless the change can be made without injury to such right. (*Vogel et al. v. Minnesota Canal Co.*, 47 Colo. 534 [107 Pac. 1108].)

"Where the right to change the point of diversion exists, it is a property right, incident to the water right itself; but it is a conditional right (therefore doubtful and questionable), and does not exist at all, as an incident or otherwise, unless it can be exercised without injury to other vested rights; nor can it be exercised until permission has been obtained in a proceeding of this character. (*Ft. Lyon Canal Co. v. Chew*, 33 Colo. 392, 81 Pac. 37.) Therefore, one who asserts the right to a change in the place of diversion has the burden of proving that the change will not injuriously affect the vested rights of others, although this may involve the proof of a negative." (*New Cache La Poudre Irr. Co. v. Water Supply & S. Co.*, 49 Colo. 1, 111 Pac. 610.)

It was established upon the trial that upon application to change the point of diversion in the Beggs and McBee permits, the same was denied by the state engineer, and we think correctly so. The state engineer could authorize no change in the point of diversion under these permits, that would in any way interfere with the right to the use of the waters of Lewellyn creek by the respondents.

We therefore conclude that the court did not err in finding that McBee and Beggs did not commence or complete, in whole or in part, the work necessary to convey the waters of Lewellyn creek to and upon the lands described in the permit, or upon the lands of the appellant, within the time or in the manner provided in said permits.

Counsel for appellant company questions the right of respondents to maintain the Hall-Goodrich ditch upon the Lewellyn land, for the reason that the ditch was located

thereon without the consent of the owners of the fee. In our opinion there is no merit in this contention. We think the rule to be well established that in an action to quiet title, appellant would not be permitted to rely upon the imperfections of respondent's title in order to establish a better title in itself, but if it is entitled to recover at all, it must recover upon the perfections of its own title. (*Winter v. McMillan*, 87 Cal. 256, 22 Am. St. 243, 25 Pac. 407; *Robinson v. Muir*, 151 Cal. 118, 90 Pac. 521.)

On November 11, 1899, James C. Roush located and claimed a water right on Lewellyn creek of one hundred cubic feet per second of time, to be used for running a sawmill and for domestic and irrigation purposes, by filing and posting a notice designated, "Notice of water right location," and stating in said notice, among other things, "reserving the right to convey said water or any part of it to any other place I may select. Said water is to be conveyed to place of use by ditches or flumes as may be considered most desirable, and I hereby claim the right to enlarge said ditches or flumes or to repair the same whenever or wherever such may be necessary or to change location of same."

This appropriation was by Roush transferred by deed to the appellant corporation on September 23, 1907, under which location and transfer appellant contends that it is entitled to divert the waters therein attempted to be appropriated by Roush to its own use and to change the point of diversion, thereby applying the water of Lewellyn creek to the irrigation of its lands by the means set out in the Roush notice of appropriation. If appellant's contention has merit, at any time during fifteen years succeeding an appropriation of water for power and irrigation purposes, an appropriator may, if he reserves the right to do so, change the point of diversion and means of conducting the water to any other place for use, and a right initiated subsequent to said date of appropriation would be subject thereto; in other words, an appropriator, if appellant's contention were true, fifteen years after making an appropriation, would be permitted (irrespective of rights that

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may intervene in the meantime) to change the use of the water, the manner of use and the point of diversion without regard to the rights of others on the stream, based solely upon filing in the office of the county recorder a "Notice of water right location." With this contention we are not in accord.

The right to the use of the waters of Lewellyn creek for the purpose of operating Roush's mill was a vested right, so long as he used it for that purpose. The evidence shows that it required fifteen cubic feet per second of time to operate the Roush sawmill. Roush, however, attempted to appropriate one hundred second-feet, for the purpose of operating his mill and for irrigation, and this he undertook to sell and convey to appellant. The record shows that he irrigated less than one-half an acre of land and had abandoned the irrigation of that one-half acre for some time prior to the commencement of this action.

Roush's appropriation of the water of Lewellyn creek, for the operation of his sawmill, would not, by a conveyance to appellant, authorize the use of said water upon the lands of appellant located at a place above the point of diversion by respondents, and thus defeat the respondents' right to the use of said water for the purpose of irrigation. The fact that Roush appropriated a large quantity of water and reserved the right to himself to change the point of diversion and to use the waters for a dual purpose, would not give him a prior right to the use of the water, except to the extent the water was actually put to a beneficial use within a reasonable time. The proof shows in this case that the quantity of water claimed by Roush and by him attempted to be transferred to appellant largely exceeded the quantity of water put to a beneficial use, either in the operation of his sawmill or upon his land, and therefore exceeded the quantity actually appropriated. (*Senior v. Anderson*, 115 Cal. 496, 47 Pac. 454.) In *Trimble v. Hillar*, 23 Cal. App. 436, 138 Pac. 376, it is held that "the test of an appropriator's right to water for irrigation is the amount of water actually used for a beneficial purpose. In the case of the *California Pastoral & Agr. Co. v. Madera Canal*

& Irr. Co., 167 Cal. 78, 138 Pac. 718, the court said: "The effect of the decisions clearly appears to be that one actually diverting water under a claim of appropriation for a useful and beneficial purpose cannot by such diversion acquire any right to divert more water than is reasonably necessary for such use or purpose, no matter how long a diversion in excess thereof has continued. . . ."

It is the settled law of this state that no person can, by virtue of a prior appropriation, claim or hold more water than is necessary for the purpose of the appropriation, and the amount of water necessary for the purpose of irrigation of the lands in question and the condition of the land to be irrigated should be taken into consideration. (*Kirk v. Bartholomew*, 3 Ida. 367, 29 Pac. 40.) A prior appropriator is only entitled to the water to the extent that he has use for it when economically and reasonably used. It is the policy of the law of this state to require the highest and greatest possible duty from the waters of the state in the interest of agriculture and for useful and beneficial purposes.

We think it is therefore clear, that Roush could not appropriate water for the operation of his sawmill and after appropriations were made by the respondents of the right to the use of the waters of Lewellyn creek for irrigation purposes, transfer his appropriation to appellant, and thus defeat the rights of the respondents to the use of the waters for the irrigation of their lands.

There is conflict in the testimony regarding the number of acres of land irrigated by the various respondents, the character of the crops grown upon their lands, the condition of the lands for irrigation, the size and capacity of the Hall-Goodrich ditch and the laterals leading therefrom to the lands of the respondent, and the duty of water. The duty of water depends upon the character and condition of the soil, and in determining the duty of water, reference should always be had to lands that have been prepared and reduced to a reasonably good condition for irrigation. The nature of the soil is so varied that it is absolutely impossible to establish a uniform

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standard of duty of water. From the record in this case, it appears that the trial court made a personal investigation of Lewellyn creek and the canal through which water is conducted to the respondents' lands and examined the same.

We do not feel that we would be justified in modifying the decree, except where it is clearly apparent that an injustice has been done to appellant. It is conceded by counsel for appellant that respondents are entitled to one-half of a cubic foot of water per second of time, prior in point of time to the rights of the appellant, but it is contended that the court was not justified, under the evidence, in decreeing to the respective respondents any amount in excess of one-half cubic foot per second of time. This contention by appellant's counsel is not based upon the insufficiency of the notice of appropriation, nor alone upon the incapacity of respondents' canal to conduct the waters to their respective holdings, but upon the ground that respondents' appropriation, except as to the one-half second-foot, is subject to appellant's prior appropriation, based upon the water permits Nos. 2158 and 2978, and upon the Roush appropriation.

In our judgment, the court is fully sustained in its finding that the Hall-Goodrich canal was constructed and through it the waters of Lewellyn creek were conducted upon the lands of the respondents and their predecessors in interest, prior to the initiation of any right in the appellant corporation by reason of the purchase of permits Nos. 2158 and 2978 and the Roush appropriation. And the finding of the court, that said canal so constructed by respondents and their predecessors, known as the Hall-Goodrich canal, was of sufficient size and capacity to carry the quantity of water decreed to the respondents, is fully supported by the evidence.

In our opinion the decree, under finding No. 2, awarding to Peter Butz an additional seven-fiftieths of a cubic foot of water per second of time from said Lewellyn creek, providing he shall make beneficial application and proof of same within two years from the date of the decree, and upon the furnishing of said proof of beneficial application, the priority of the

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water right shall be established as of date December 17, 1900, should be modified, for the reason that said finding is not supported by the evidence. An appropriator of water after conducting the same to the point of intended use has a reasonable time in which to apply said water to such intended use. Rutz had a reasonable time prior to the trial of this cause, in which to apply the waters appropriated by him to a beneficial use. To anticipate what he might do in the future, or to permit him to make a further application of the water to a beneficial use and make proof thereof, we think, under all of the circumstances in this case, would not be warranted, and the trial judge is instructed to modify the decree in this respect.

Hall, in his deposition, testifies that in 1895 he had five acres under cultivation. In 1907, he sold his homestead, consisting of 160 acres, to Kern and Imlay. In October, 1908, Kern transferred his one-half to Imlay, who, on April 21, 1910, sold to Ledbetter and wife. Ledbetter and wife transferred eighty acres, in May, 1910, to respondent King.

From an examination of the testimony covering a period of nineteen years, not to exceed sixty acres of the Hall entry were made susceptible of irrigation.

The court decreed to King one and one-fifth cubic feet of water per second of time. We think this amount was excessive and is not supported by the testimony. The decree will, therefore, be modified, and in lieu of one and one-fifth cubic feet, the court will decree to respondent King nine-tenths of a cubic foot of water per second of time, as of date June 12, 1897.

Appellant assigns as error the failure of the court to ascertain the entire amount of water that flows in Lewellyn creek during the irrigation season, and the failure of the court to decree to all of the parties to the action their right to the use of the waters of said stream. We think that the decree is sufficient, with the modifications ordered, so far as the rights of the respondents are concerned, but upon the authority announced in the case of *Lee v. Hanford*, 21 Ida. 329, 121 Pac.

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558, it was the duty of the court not only to fix the date of the appropriation of the respondents and the amount of water that each is entitled to, but also to decree to the appellant whatever right to the use of the waters of said Lewellyn creek it may have been entitled to, and fix the date of the appropriation. The trial court is, therefore, directed to make such additional findings and amendments to its decree as are herein specified. If the court is of the opinion that additional testimony should be introduced on behalf of either of the parties to this action, to aid in determining the exact quantity of water which should be adjudged to the appellant, such additional testimony may be introduced upon this particular question by either of the parties to this action, and the trial court is hereby authorized to fix a time for the taking of said testimony and to enter a final decree as herein indicated.

Each party to this action to pay its own costs.

Sullivan, C. J., and Morgan, J, concur.

ON PETITION FOR REHEARING.

(April 28, 1915.)

SULLIVAN, C. J.—A petition for rehearing has been filed in this case and after a very careful examination of it the court has concluded to remand the case to the trial court with the following additional instructions:

(1) Amend the judgment or decree so as to require the plaintiff and defendants to put in a proper measuring device for the purpose of measuring the water allotted to them at the point of diversion, as provided in the original decree;

(2) Amend finding of facts to the effect that the plaintiff's irrigation works were of sufficient capacity on August 23, 1909, to carry six cubic feet of water per second of time; and

(3) Amend the decree by awarding to plaintiff a water right of six cubic feet of water per second of time from Lewellyn creek, from August 23, 1909.

 Points Decided.

These amendments are not to interfere with the prior rights of defendants as established by said decree as modified by the opinion in this case.

Because of the foregoing modifications of the opinion of this court, the petition for a rehearing is denied.

Budge and Morgan, JJ., concur.

(March 11, 1915.)

STATE, Respondent, v. C. J. CLARK, Appellant.

[146 Pac. 1107.]

CRIMINAL LAW—JURORS—CHALLENGE—IMPLIED BIAS—EVIDENCE—MOTION TO STRIKE OUT—DEFENDANT'S WITNESS—ARREST OF—IN PRESENCE OF JURY—CONDUCT OF PROSECUTING ATTORNEY—PREJUDICE—NOT CURED BY INSTRUCTION—REJECTION OF OFFERED EVIDENCE—CONTINUANCE—AFFIDAVIT FOR—ADDITIONAL INSTRUCTIONS—ERROR—DATE OF CRIME—ELECTION BY STATE—MOTION FOR NEW TRIAL—COUNTY ATTORNEY—COMPEL DEFENDANT TO LEAVE THE STATE—CONTRADICTORY TESTIMONY—INSTRUCTIONS—ACCOMPLICE.

1. The court did not err in denying challenges to certain jurors on the ground of implied or actual bias.

2. Where a motion is made to strike out the entire answer of a witness where a part of such answer is responsive to the question and a part is not, it is not error for the court to deny such motion.

3. Where a witness for the defendant testifies that he was in the room of the prosecutrix on the evening or night the alleged crime was committed, and the prosecuting attorney states in open court and before the jury that the witness, according to his own testimony, had committed an offense under the laws of the state, and demands that he be remanded to the custody of the sheriff to be prosecuted for such offense, and the court thereupon orders the arrest of the witness, and he is arrested in the presence of the jury and taken from the courtroom and placed in the jail, such proceeding is prejudicial error and an invasion of the rights of the defendant, and an intimation of the opinion upon the part of the court that the witness had committed either perjury or some other felony. Such action was prejudicial to the rights of the defendant.

Argument for Appellant.

4. An instruction given by the court to the effect that the jury must not be influenced in any way by the action of the court in ordering the arrest of the witness in the presence of the jury and must not be influenced by the remarks of the court or counsel touching the arrest of said witness, did not, and could not, cure the error of the conduct of counsel or the action of the court in said matter.

5. *Held*, that the action of the assistant prosecuting attorney and the arrest of the witness in the presence of the jury was reversible error.

6. It was error for the court to reject any of the testimony given by the prosecutrix on the preliminary examination which would tend to impeach or contradict the testimony she gave on the trial of the case.

7. *Held*, that the court erred in refusing to admit certain affidavits made for a continuance, where the state, in order to avoid a continuance, admitted that if the witnesses named in the affidavits were present, they would testify as set forth in the affidavits.

8. *Held*, that the court erred in giving certain instructions.

9. *Held*, that the court erred in not granting defendant's motion for a new trial.

10. Under the provisions of sec. 7871, Rev. Codes, a conviction cannot be had upon the testimony of an accomplice unless he is corroborated by other evidence.

11. Where the testimony of the prosecutrix is contradictory or her reputation for truthfulness and veracity is impeached, and the defendant testifies and denies specifically the testimony of the prosecutrix, and his testimony is corroborated by other witnesses, the testimony of the prosecutrix without corroboration will not warrant a conviction.

APPEAL from the District Court of the Fifth Judicial District, in and for Power County. Hon. Alfred Budge, Judge.

The defendant was charged with and convicted of the crime of incest and sentenced to a term of from five to ten years in the penitentiary. Judgment reversed and a new trial granted.

McDougall & Jones and T. S. Becker, for Appellant.

The record discloses that the jurors Meadows and Beckstead had heard the facts in this case and had formed an opinion

Argument for Appellant.

which would require evidence to remove at the time of the examination. (*Burke v. McDonald*, 3 Ida. 296, 29 Pac. 98; *State v. Caldwell*, 21 Ida. 663, 123 Pac. 299; 24 Cyc. 302.)

The admission of a statement of prosecuting witness that when she was a child ten years ago another and distinct crime had been committed by the defendant was clearly error. (62 L. R. A. 338, note; 12 Cyc. 405; *People v. Bowen*, 49 Cal. 654; *State v. Anthony*, 6 Ida. 383, 55 Pac. 884; *State v. Williams*, 36 Utah, 273, 103 Pac. 250; *State v. Marselle*, 43 Wash. 273, 86 Pac. 586.)

The court erred in directing the sheriff to take into his custody a witness for the defendant off the witness-stand and in the presence of the jury. (*Golden v. State*, 75 Miss. 130, 21 So. 971; *Commonwealth v. Brady*, 71 Mass. (5 Gray) 58; *Reed v. State*, 5 Okl. Cr. 365, 114 Pac. 1114.)

"It is the duty of the trial court to refrain from allowing their acts and words to indicate to the jury their opinion of the credibility of any witness who testified in a case on trial before them, or of the merits of any such case." (*State v. Hughes*, 33 Kan. 23, 5 Pac. 381; *People v. Abbott*, 4 Cal. Unrep. 276, 34 Pac. 503; *Hicks v. United States*, 2 Okl. Cr. 626, 103 Pac. 873; *State v. Taylor*, 7 Ida. 134, 61 Pac. 288; *State v. Fowler*, 13 Ida. 317, 89 Pac. 757.)

The court erred in rejecting the offer of the defendant to read to the jury the answers made by the witness Abi Clark Luper before the committing magistrate at the preliminary examination, offered for the purpose of impeaching her evidence given at the trial. (*State v. Trego*, 25 Ida. 625, 138 Pac. 1124; *State v. Corcoran*, 7 Ida. 220, 61 Pac. 1034; *State v. Fowler*, 13 Ida. 317, 89 Pac. 757.)

Where the testimony of the prosecutrix is contradictory, or her reputation for truthfulness and veracity is impeached and the defendant testifies and denies specifically the testimony of the prosecutrix, and his testimony is corroborated, the testimony of the prosecutrix, standing alone, is not sufficient to warrant a conviction. (*State v. Trego*, 25 Ida. 625, 138 Pac. 1124; *State v. Tevis*, 234 Mo. 276, 136 S. W. 339.)

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If prosecutrix submits to the intercourse, though unwillingly, she is an accomplice. (*Mercer v. State*, 17 Tex. App. 465; *Coburn v. State*, 36 Tex. App. 258, 36 S. W. 442; *Clifton v. State*, 46 Tex. Cr. 18, 108 Am. St. 983, 79 S. W. 824; *Tate v. State* (Tex. Cr.), 77 S. W. 793; *Gillespie v. State*, 49 Tex. Cr. 531, 93 S. W. 556; *Skidmore v. State*, 57 Tex. App. 497, 123 S. W. 1129.)

J. H. Peterson, Atty. Genl., T. C. Coffin and E. G. Davis, Assts., O. R. Baum and W. G. Bissell, for Respondent.

If the challenge is for actual bias, it must be alleged that the juror was biased against the party challenging. (*State v. Gordon*, 5 Ida. 297, 48 Pac. 1061; *People v. Reynolds*, 16 Cal. 128.)

The examination of the jurors Meadows and Beckstead failed to disclose implied bias under subdivision 8 of sec. 7834, upon which the appellant relies, namely, that these jurors had formed or expressed an unqualified opinion or belief. (*People v. Reynolds*, 16 Cal. 128; *State v. Millain*, 3 Nev. 409-429; *State v. Davis*, 14 Nev. 439-450, 33 Am. Rep. 563; *People v. O'Loughlin*, 3 Utah, 133, 1 Pac. 653.)

The decision of the trial judge as to whether a juror is biased has the effect of a verdict of a jury upon the facts, and will seldom, if ever, be disturbed. (*People v. O'Loughlin*, *supra*.)

According to some authorities the court may, in the exercise of its discretion, commit to jail, in the presence of the jury, a witness who has in its opinion perjured himself before the jury, or at the preliminary examination, without committing error. (12 Cyc. 542; *Commonwealth v. Salawich*, 28 Penn. Super. Ct. 330; *State v. Strado*, 38 La. Ann. 562; *Lindsay v. People*, 67 Barb. (N. Y.) 548, 63 N. Y. 143; *People v. Hayes*, 70 Hun, 111, 24 N. Y. Supp. 194, 140 N. Y. 484, 37 Am. St. 572, 35 N. E. 951, 23 L. R. A. 830.)

Where a witness upon the stand tells a part of the incriminating evidence against himself, voluntarily and without claiming his privilege, he is obliged to make a complete dis-

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closure thereof. (*People v. Freshour*, 55 Cal. 375; *Clark v. Reese*, 35 Cal. 89.)

SULLIVAN, C. J.—The defendant was convicted of the crime of incest, alleged to have been committed upon his daughter, a married woman about twenty-two years of age, on the 14th of January, 1914, in Power county, and was given an indeterminate sentence in the state penitentiary for a term of not less than five years and not to exceed ten years.

A motion for a new trial was denied and the appeal is from the judgment and the order denying the new trial.

The errors specified to have been committed by the court were in regard to challenges of certain jurors; refusing to strike out certain testimony; directing the sheriff in the presence of the jury to arrest one of the defendant's witnesses on account of testimony he gave on the trial; rejecting certain evidence offered by the defendant; permitting the foreman of the jury, after having been out seventeen hours, to state the matters which in his opinion were preventing the jury from agreeing and in instructing the jury upon such points; giving certain instructions; overruling defendant's motion for a new trial; and in instructing the jury that they might convict upon the uncorroborated testimony of the prosecutrix.

The record shows that the defendant is a man 51 years of age and has a wife and family of ten children, the two oldest being the prosecutrix (about 22 years of age) and a Mrs. Dowell, a married woman about 20 years of age.

The record shows that the people in and about Rockland and vicinity where the defendant resided became very much excited over this matter and very much prejudiced against the defendant, and the county attorney took a very active part in working on the case prior to the time the defendant was arrested, and also assisted in persuading the defendant to leave the state and go to the state of Oregon, with the understanding that he would not be prosecuted provided he stayed away, the claim being made that if defendant would do this his family would not be disgraced. The husband of the

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prosecutrix and also the husband of her sister, as well as a banker of Rockland, took a very active part in this matter. It appears that the defendant had two or three farms in Power county, worth considerable money, and that he had threatened to disinherit the prosecutrix if she married the man she did marry, and that he had paid a physician for performing an operation on Luper, the husband of the prosecutrix. Regardless of the facts stated, the prosecuting witness testified that she was afraid defendant, her father, would kill her husband, and the record shows that she was somewhat exercised on this subject and desired to have her father leave the state; that after the county attorney and the prosecutrix, her said sister, Mrs. Dowell, her husband and brother-in-law, a prominent business man, and the sheriff had consulted over the matter, it was insisted that the defendant leave the state, and the sheriff and the county attorney accompanied him from Rockland, or his home near there, to American Falls, for the purpose of seeing that he took the train and left the state, as urged and suggested by them. The defendant went to Vale, Oregon, where he was arrested about two weeks later, and was prosecuted and convicted of said crime.

The feeling ran high in the county against the defendant, and in the selection of a jury, Jurors Meadows and Beckstead stated that they had heard the facts, or some of them, in the case and had formed an opinion, and had an opinion which it would require evidence to remove. They were challenged on the ground of implied and actual bias. Beckstead also was challenged on the ground that the prosecuting attorney was his personal attorney.

It is contended by counsel for the state that said challenges were properly overruled, for the reason that under the provisions of sec. 7836, Rev. Codes, in a challenge for implied bias one or more of the legal causes provided as the ground of a challenge for implied bias by the provisions of sec. 7834 was not stated as the ground of challenge. Sec. 7834, Rev. Codes, states nine grounds of challenge for implied

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bias, and neither of said grounds was stated in said challenge, as required by said sec. 7836.

Under all of the facts as they appear in the record, we do not think the court erred in overruling said challenges, but would suggest that in this class of cases, where prejudice is usually so great against a defendant charged with such a crime, a court ought to be very careful in the selection of a jury to reject all persons who are biased and prejudiced in the matter.

It is next contended that the court erred in overruling defendant's motion to strike out the following answer of Geneva Dowell, daughter of the defendant and sister of the prosecutrix: "Q. The particular thing that you were afraid of was that your husband would find it out? A. Yes; because my father was too intimate with me." It is contended that said answer was not responsive and was highly prejudicial. It is clear that "yes" would have fully answered the question and was responsive, and the witness throwing in the remark, "because my father was too intimate with me," was improper and not responsive to the question; but since counsel moved to strike out the whole answer when a part of it was proper, the court did not err in refusing to strike out the entire answer, whereas it would have been error for the court to have denied a motion to strike out that part of the answer which was not responsive to the question. Since the motion was to strike out all of the answer, the court did not err in denying that motion.

The fifth specification of error involves the action of the court in directing the sheriff, in the presence of the jury, on motion of the prosecution, to take into custody witness Haggard, who testified on behalf of the defendant that he was at the residence of the defendant on the evening and night of the 14th of January, the date said crime was alleged to have been committed, and that he talked with the prosecutrix, and in that conversation he told her that he was coming to her room that night, and she said, "Well, Jim, you know where my room is." He testified that he went to her room sometime between 10 and 11 o'clock and remained there about thirty

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minutes; that he left there about 11 o'clock, or fifteen minutes after, and that the defendant was not in her room at that time. On cross-examination by Mr. Bissell, who was assisting the prosecuting attorney, the following proceedings were had: "Q. You went in there [meaning into the prosecutrix's bedroom]? A. Yes, sir. Q. You stayed about thirty minutes? A. Yes, sir. Q. What did you do while there? A. We talked. Q. Just talked—just went in there and talked? A. Yes. Q. You stayed and visited about thirty minutes? A. Yes, sir. Q. All you done? A. I refuse to answer what I did. Mr. Bissell: Now, your Honor, we insist that the witness tell. The Court: If he wants to claim that privilege, of course I don't know. Mr. Bissell: We have a right to show it. The Court: Why do you object to answering? A. It is incriminating myself, isn't it? The Court: I don't know whether it is or not. You should know that. You may proceed, Mr. Bissell. Mr. Bissell: I will ask that this witness, who is now on the stand, according to his own testimony having committed an offense under the laws of the state of Idaho, be remanded to the custody of the sheriff. Mr. Jones: If your Honor please, we say that is vicious misconduct upon the part of the attorney for the state in the presence of this jury. The Court: Are you through? Mr. Bissell: I now ask that this man be remanded to the custody of the sheriff, for the reason that in accordance with his own testimony he has shown himself guilty of a criminal offense. Mr. Jones: We resist that demand and desire the record to show that it is made for the purpose of creating a prejudice in the minds of this jury, and it is not in line with any rules of evidence that counsel can cite. We except further to the statement of counsel with reference to this witness. The Court: Are you through with the examination? Mr. Bissell: We are. The Court: Are you, Mr. Jones?"

Thereupon Mr. Jones proceeded to re-examine the witness and after he had concluded the court said: "Mr. Sheriff, you will take this witness in custody and retain him until such time as this case might be investigated. I will instruct the jury with reference to this matter, gentlemen, before

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this case is finally submitted to them. Mr. Jones: Allow an exception to the order of the court. The Court: You may have your exception. Mr. McDougall: Let the record show that the sheriff took the witness from the stand, in the presence of the jury. The Court: No, I don't know that the record need show that, General McDougall. Let the record show that I simply remanded him to the custody of the sheriff, and excused him from further testifying. The physical fact is apparent, however, that he was taken out of the courtroom."

As we view it, the conduct of the assistant prosecuting attorney in this matter was reprehensible, and he ought to have been reprimanded by the court; but no doubt the matter was sprung so quickly on the trial judge that he either concluded that the witness had committed perjury or that he had committed a crime by staying in the room with the prosecuting witness for half an hour and then refusing to testify what he did there for the reason that it might incriminate him. The jury heard and observed the entire proceedings. They heard the assistant prosecuting attorney say, "I now ask that this man be remanded to the custody of the sheriff for the reason that in accordance with his own testimony he has shown himself guilty of a criminal offense." Thereupon the court remanded the witness to the sheriff in the presence of the jury, and the witness was arrested and taken from the courtroom.

It is clear to us that the remarks of the prosecuting attorney and the action of the court in ordering the witness into the custody of the sheriff was most prejudicial to the defendant. The action of the court informed the jury that it was satisfied that the witness had committed either perjury or adultery, which very much discredited him in the minds of the jury as well as prejudiced the defendant's case. It is a well-recognized fact that jurors as a rule are quick to discern the opinion of the trial court as to the guilt or innocence of a defendant, or his opinion as to the truthfulness of a witness, and if a juror concludes from the act or suggestion of the court that it disbelieves a witness, it is sure to

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have a prejudicial effect against the litigant calling the witness, and especially is this true where public feeling and prejudice run rampant against a defendant charged with a horrible crime.

It was said in *Reed v. State*, 5 Okl. Cr. 365, 114 Pac. 1114, in a case very much like the one at bar, that "The most liberal advocate of the doctrine of harmless error could not insist that a conviction secured under such circumstances should be allowed to stand. . . . Trial courts should carefully refrain from allowing their actions or words to indicate to the jury any opinion whatever as to the merits of any case upon trial before them or their idea of the credibility of any witness who testifies before a verdict is rendered, and especially so in the trial of criminal cases."

In *State v. Primmer*, 69 Wash. 400, 125 Pac. 158, which was an incest case, it was held that for the judge, in the presence of a jury, after the witness has testified, to order her into the custody of the sheriff and direct the proper officer to file a charge of perjury against her, is a comment on the facts and reversible error. (See, also, *Golden v. State*, 75 Miss. 130, 21 So. 971; *Commonwealth v. Brady*, 78 Mass. 58; *State v. Hughes*, 33 Kan. 23, 5 Pac. 381.)

It may have been that if the prosecuting attorney and the court had not discredited the witness Haggard, the jury might have found the defendant not guilty, for if Haggard's testimony in regard to being present in the room of the prosecutrix for a half hour on the evening of the 14th of January, 1914, had been believed by the jury, they no doubt would have found the defendant not guilty of the crime charged, as Haggard testified that he was in the room with the prosecutrix at the very time that she claimed her father was in there with her. It is in this view of the matter that appears the grave injustice done to the defendant by the action of the prosecuting attorney and the court in ordering the witness arrested as was done. As to misconduct of prosecuting attorney, see *State v. Jackson* (Wash.), 145 Pac. 470.

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But it is contended by counsel for the state that the court rendered its action harmless in having said witness arrested, by giving the following instruction:

“You are not to be influenced in any way by the action of the court in detaining the witness, James Haggard, pending investigation, or by the remarks of the court or counsel touching this matter, but you should consider the evidence only in this case and apply the law as given you in these instructions in determining the guilt or innocence of the defendant.”

Regardless of this instruction, the jury was out seventeen hours deliberating before it brought in a verdict of guilty. That instruction could not render the previous action of the court in regard to the arrest of said witness harmless. The whole proceeding in regard to that matter no doubt influenced the minds of the jury against the defendant and prejudiced them against him. Such an error as this cannot be cured by a simple instruction to the jury, for we all know, as men and lawyers, what effect such proceedings would have upon the mind of the average jurymen. That instruction would not take from the minds of the jury the fact that said witness had been discredited by the court and that in the opinion of the court he was guilty of perjury or some other felony. The prejudice created by the demand made by counsel for the state and by the court in granting such demand, in the presence of the jury, could not be cured by any instruction. In any case, and especially in such cases as the one at bar, the trial court should refrain from allowing his acts or words to indicate to the jury his opinion of the credibility of any witness who testifies for the defendant or the state.

In *State v. Taylor*, 7 Ida. 134, 61 Pac. 288, the court said:

“In the trial of a criminal case, and more especially one in which the life of the defendant is involved, the trial court cannot be too careful in refraining from any act or expression which can possibly tend to prejudice the case of the defendant with the jury.”

The action of the deputy prosecuting attorney in this matter and the arrest of said witness in the presence of the jury was clearly reversible error.

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Counsel for the defendant offered to read to the jury certain answers made by the prosecutrix before the committing magistrate at the preliminary examination, for the purpose of impeaching certain evidence given by her on the trial, and the court rejected such offer. This action of the court is assigned as error. It was error for the court to reject any of the testimony given by the prosecutrix on the preliminary examination which would tend to impeach or contradict the testimony she gave on the trial of the case, since it was the clear right of the defendant to show to the jury that the prosecutrix had testified to one state of facts on the preliminary examination and to another state of facts on the trial, if he could do so.

A motion was made for a continuance of the trial of this case, supported by affidavits. On the hearing of said motion it was admitted by the state that the witnesses referred to in the affidavits, if present, would testify as set out in the affidavits, subject, however, to the competency of such testimony. On such admissions the motion was overruled. On the trial said affidavits were offered in evidence and rejected by the court on the objection of the assistant prosecuting attorney. Said affidavits go to show the physical and mental condition of the prosecuting witness for several years prior to her charging the defendant with this crime, and that she had made similar charges against two persons in the state of Washington, when such charges were absolutely false. The court erred in rejecting those affidavits, as they tended to show the mental and physical condition of the prosecutrix and that she had charged others with similar crimes.

The eighth, ninth and tenth assignments of error refer to the action of the jury in returning to the courtroom after having been out seventeen hours, and asking for further instructions from the court. After the jury had returned the court said: "Gentlemen of the jury, the bailiff informs me that you desire some additional instructions. Mr. Creasey (Foreman of the jury): Yes, sir. The Court: What seems to be the point? Mr. Creasey: In one case, there are some that want to know if this evidence must be on just the 14th,

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the night of the 14th, and morning of the 15th only; consider that only, and I think with probably two or three there is the sticking point. The Court: All right, Mr. Foreman, Gentlemen of the jury, the court will give the following instructions with reference to the matter inquired about:

“The court instructs you that the state elected to secure a conviction of the defendant for the crime of incest alleged to have been committed on the night of January 14th or morning of January 15, 1914, and more definitely fixed and explained as the time shortly subsequent to the operation performed upon the husband of the prosecutrix, as testified to by the witnesses. If you are satisfied, beyond a reasonable doubt, that the defendant had sexual intercourse with the prosecutrix at said time or date, in the manner and form as alleged in the information, the defendant would be guilty of incest, and it would be your duty to so find. . . . It would be immaterial whether said act was committed on the night of the 14th or morning of the 15th of January, 1914. . . . ”

The state elected to rely for conviction upon the act of incest alleged to have been committed immediately after the operation on the husband of the prosecutrix, and fixed the time as the evening of the 14th or morning of the 15th of January, 1914. It would appear from the question asked by the foreman of the jury, above quoted, that there was a query in the minds of some of the jurymen, at least, as to whether if the defendant were convicted it must be upon the testimony showing that the act was committed on the night of the 14th or morning of the 15th of January, and it is contended by counsel that it was highly prejudicial to the defendant for the court to give said instruction and not limit the jury to the time elected by the state in said case. The testimony of the prosecutrix as to the time the act occurred was contradictory and conflicting. At one time she placed it on the night of the 15th and again testified positively that it was on the night of the 14th—the 14th being the day when the operation was performed on her husband. Thereafter she testified that it was on the night of the 15th and she again

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testified that when she said at the preliminary hearing that her father made advances toward her on the night of the 14th it was false. Again she testified it was either on the 14th or 15th, but could not remember which. From this conflicting testimony it can readily be seen that the jury might well inquire whether they were confined to the particular time which the state had elected, which was the night of the 14th, since the witness Haggard had testified that he was with the prosecutrix for a half hour or more between 10 and 11 o'clock on the night of the 14th, and if his testimony be true, the defendant was not there from 8:30 P. M. until midnight on the night of the 14th, and there was no testimony whatever that the act occurred on the morning of the 15th. The prosecutrix, however, testified that the defendant came to her room on the night of January 14th at about 8 o'clock and remained until midnight.

The prior acts of defendant testified to would only be competent, if competent at all, for the purpose of showing familiarity between the parties or for the purpose of corroborating the offense charged, provided it should be held that the prosecutrix was not an accomplice. In case she were an accomplice, she could not corroborate her own testimony by testifying that the defendant had been intimate with her prior to the date of the crime charged in the information or prior to the time of telling others that he had done so. That being true, the jury should have been limited to find whether the act was committed on the date elected by the state, and the court should have limited the jury to the time so elected, since the defendant was not prosecuted for any other act than the one charged to have occurred on the date so elected by the state.

Counsel next specifies the action of the court in overruling defendant's motion for a new trial as error. The evidence shows this to be one of the most remarkable cases of its kind that has ever come under our observation. The children of the defendant, one twenty years of age, married and the mother of two children, the other twenty-two, also married, testified against their father, the defendant, charging him with one

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of the most horrible crimes that a father could commit. The older daughter's main pretense was that she had to make this complaint against her father in order to save her husband, whom she claimed her father had threatened to kill, and the other daughter claimed that she was led to believe her husband would leave her and her children and thus disgrace them unless she charged her father with a similar crime and supported the testimony of her sister in attempting to send her father to the penitentiary, and also perhaps out of fear that the father might disinherit them. A neighbor or neighbors took a hand in the matter, as well as the sheriff and county attorney, and the evidence shows that they sought to intimidate the defendant and drive him out of the state. The record shows that the county attorney was most active in this matter, claiming all the time that he wanted to protect the family from disgrace; but according to the record, it appears that he suggested several times to the defendant that he ought to do the right thing by the prosecutrix and her sister in the distribution of his estate or property. The pretended desire of the county attorney to save the family from disgrace by driving the father out of the state was evidently a very shallow pretense. Apparently the county attorney was more interested in the distribution of the defendant's property than in the prosecution of the defendant for the crime charged. He was so insistent in the matter that he would not permit the defendant or his wife, the mother of the prosecutrix and her twenty-year old sister, to talk with either of them unless he was present, and he and the sheriff accompanied the defendant to the railroad station in their evident purpose to drive the defendant out of the state. It seems wholly improbable that a neighbor or friend, the sheriff and the county attorney, could imagine that this matter could be hushed up and the disgrace of the prosecutrix and her sister avoided by driving the defendant out of the state, when the husbands of both knew all about the charges these sisters had made against their father. They also took possession of a boy of some eighteen years of age and would not let the

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mother or father have possession of him until they were compelled to do so by writ of *habeas corpus*.

All of the facts in this case and surrounding this transaction, as appear from the record, show that there was some motive back of it all, aside from protecting the family from disgrace, as was urged by the county attorney and the pretended friend. The evidence clearly shows a conspiracy to get rid of the defendant by driving him out of the state.

In a conversation at Fisher's bank at Rockland on the day of the evening that the defendant left the state for Oregon, the defendant, Baum, Fisher and Mrs. Clark being present, Mrs. Clark testified as follows: "Mr. Clark begged for them not to drive him off that way, that he had business at home, that he couldn't leave, and that he had horses that the children couldn't manage, and Mr. Fisher said he would have to hire someone to take care of the horses, and Mr. Fisher helped Mr. Baum decide on the way that Mr. Clark should leave home." This evidence is not contradicted by either Fisher or Baum. The witness further testified that when it was concluded that the defendant must go to American Falls that evening and take the train, "I said that I was going with Mr. Clark to the Falls. Mr. Baum said that Mr. Jefferies [the sheriff] had a single rig and there was no room for me. I told him we had teams and I was going to the Falls with him. He said: 'All right,' and for us to go on home and be ready at 7:30, and Mr. Baum came by. Q. Did they permit you to talk to your daughter Geneva that night? A. No, sir. Mr. Baum come right around with her and stayed right by her."

The defendant himself testified in regard to his conversation with the prosecuting attorney Baum as follows: "He told me that I would have to leave the state, but he says, 'You have got to own up to this before you go,' and I says: 'I will not tell any kind of a lie like that on myself and daughters.' He says: 'You are a liar, and this is so and know it is so,' and went on that way, and finally he said: 'Supposing both of the girls say that it is so, then what would you say?' and I said: 'I would say it is a lie just the same.' He says: 'You wait here for a little while and I'll go back

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to Fisher's,' and he went and the sheriff was in there, and he never said nothing, and he come back, and he says, 'Mrs. Dowell says it is so too; now what do you say about it?' and I says, 'Just the same as I did, that there is not a word of truth in it,' and he says: 'I'll tell you, Mr. Clark, what I'll do. I am willing to let you go providing you will leave the state and never return any more,' and I says: 'That's a pretty hard sentence. If you've got a warrant for me, why don't you take me under arrest instead of trying to get me out of the state,' and he says, 'I am doing this to save the name of them girls, and that is why I am letting you go, Mr. Clark,' and he says, 'You must not forget these girls in their part of the estate,' and he come over that lots of times to me. He was talking that I should give so much to each one of these girls."

Neither Baum, Fisher nor the sheriff denied any of the testimony of the defendant and his wife in this case.

It appears that the defendant was taken by the county attorney and sheriff to American Falls that evening and started on his way out of the state. The daughter, Mrs. Dowell, shortly after that wrote letters to her father, and also a letter to H. C. Eastham, the attorney of the defendant in Oregon, the latter dated March 3, 1913, which was clearly intended for March 3, 1914. The letter to Eastham speaks for itself and is as follows:

"Rockland, Idaho, March 3, 1913.

"Mr. H. C. Eastham:

"Dear Sir:—

"I received your letter this morning and will give you an account of all that happened.

"Papa and Mamma stayed at my home Tuesday night and I come home with them Wednesday with the intention of staying until I had my teeth fixed. Thursday morning we went to town and Mamma and I called to see the minister's wife. While mamma was in Mrs. Shaw's bedroom the Doctor called. He asked me if I'd seen Abi yet, and I told him no. He said she was up to Mrs. Fisher's and was sick. He told me to go and see Abi, and whispered and said: 'Go

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alone.' Of course, I knew papa didn't like Mr. Luper, and I thought Abi wanted to tell me her trouble, so I went. When I went in Abi asked me to sit down, but I told her I had to hurry because I had left my baby with mamma. She asked me to go in the bedroom with her so I went. She told me that papa was going to kill John, and I laughed at her. She talked for a few minutes, and then asked me if I didn't hear papa say he was tempted to kill John. Of course, I said yes because it was true. She told me to go into the other room and we would talk it over with John. I told her I was not going to say a word to John. I turned around to go out and there stood John in the door. He had heard every word I said. He told me he heard what I said and said for to tell Mr. Baum. I told him I had to go back to Shaw's to Mildred and he stood with his back to the door. Abi then asked me to confirm what she said about herself, papa and I being too intimate. That I knew to be false and told her so. She denied it and said I knew it to be true. We disputed over it until I was so nervous I could hardly stand on my feet. I told her and John if I was scared to death like they were and had no little ones I would walk off of my place and leave the country before I would stir up a row like that. John said if papa would give him between three and four thousand dollars for his place he would leave quietly. Of course, no one would give that price for a place like he has. Anyway it looked like only a coward would buy a place on conditions like that. Then they told me they had enough evidence anyway— But if I would say what they told me too there would be no publicity about it whatever and if I didn't we would all be disgraced. I told them I'd die *any* kind of a death before I'd swear a lie on my papa. By that time I was nearly dead I was so nervous. Still I refused to see or speak to Mr. Baum. My sister got something in a glass of warm water and told me to drink it and I'd feel better. I was innocent enough, or rather *green* enough to drink it. I fainted and when I came to my senses John & Baum were putting me into a large arm chair. I felt numb all over.

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Just like I imagine one feels after being drugged. I could hear Baum talking to me and could hear myself answer—it all seemed a dream—a nightmare. Baum got up and said he would go to town and talk to papa. I remember Abi and John leading me to a lounge and telling me to lay down and sleep. I objected. Said Mildred would be crying. Abi and Mr. Baum said for John to go and get baby and for me not to go outside at all and if mama should come to see Abi for me to be just as natural as I could and not tell anything that had happened. I was still so weak I didn't care so I just lay still. Mama said papa was ready to go. I told her I'd stay with Abi until eve and John would take me up. She only stayed a few minutes. I stayed from one thirty until 4:30 and then Baum came back and said papa said positively it was false. Of course I knew it was but I was still feeling so stupid that I did not care. Baum went back and stayed until 5:30, then we saw papa's team leave town. I cried and told them I was going to cut across and go home with papa and mama. John said I should not. Baum and Mr. Fisher came then and said papa still said it was not true, but would leave town, also leave the state. They all went into the dining room and left me in the parlor. I ask why and Abi said they were afraid to tell me; afraid I'd faint again. I heard Fisher say that Abi would get her full share of papa's estate. They said everything would be sold and we kids provided for. Mr. Fisher ask me if my mother knew that we girls and papa was too intimate with us. I said *no*. Abi said *Yes*. I told him my mother was a lady and only a coward would speak doubtfully of her. Baum wanted me to talk to him again and I would not. I was in the kitchen and Abi ask me why I wouldn't. I told her I hated him. They said swallow my dislike and talk anyway. Baum came to the door and said if my Mama stayed home that night I should *not*. Said Mr. Jefferies would go up with John and get my other baby. Said Mama had too much influence over me. They tried to make me think my father would kill me. I told them I knew better. Mr. Fisher told me to tell my husband that papa was mean to

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me. I told him I would die first. Then they ask me if I loved papa. I told them certainly. John and Abi went to the restaurant with Mrs. Fisher and Mr. Fisher. They left me with Mrs. Fisher's mother. At 7:15 we left town and started to papa's home. We met papa and mama leaving & Baum got out of his buggy and helped me out of John's buggy. He stood by me and I couldn't get to talk to papa. I hope I have made it all clear to you. Wasn't put on oath at all.

(Signed) Mrs. DOWELL."

The author of said letter testified that her mother procured her to write that letter, although her mother was in Oregon at the time it was written. However, many of the statements in said letter showing the truthfulness of it were admitted by its author when testifying for the state, and many of the statements are shown to be absolutely true by other testimony. She was a married woman, of mature years, the mother of two children, and is it not almost improbable that she should sleep in the same room with her sister, the prosecutrix, for some time, and the alleged conduct of her father going on once or twice a week and she not know anything about it? Her testimony shows that all she knew in regard to the matter was what her sister admitted some three years before the trial of the case that her father had committed such acts with her. And is it not improbable that a mother of eleven children should sleep for years in the house of three rooms only and not know something of the alleged conduct of the father with the daughter provided such conduct occurred? The alleged acts were testified to by the prosecutrix as having occurred in the house in bed. The prosecutrix testified that she did love her mother before her marriage and still she never intimated to her that her father was having illicit relations with her. Just before she was married she stated to her mother that she was going to her husband a pure woman aside from some conduct with an uncle alleged to have occurred in the state of Washington. It seems so improbable that a mother would not know of the alleged conduct of her husband, occurring year after year, and if she did know of it that she would

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quietly submit to having such conduct going on in the very room in which she slept with her children and husband. The evidence clearly shows that the prosecutrix was very angry with her father because he would not permit her to marry the man Malcolm, and she stated when testifying, in effect, that she made these charges against her father because she was afraid he would kill her husband, when all of the evidence goes to show that at the time of their marriage, and for several weeks thereafter, every week the prosecutrix and her husband visited the father at the family home, stayed there for several days at a time; that her father employed a doctor to perform an operation on her husband, assisted with the operation and paid the doctor twenty-five dollars in gold for performing such operation.

These physical facts and many others contained in the record go to show that this story of the fear of the witness that the father would kill her husband was a mere subterfuge and brought forth to conceal some other ulterior purpose,—the purpose, as the record shows, to get what is claimed to be her part of her father's property.

The morning after the father was driven out of the state by the prosecuting attorney and the sheriff, the husband of the prosecutrix appeared at the ranch of the defendant and took therefrom two pedigreed pigs, thus showing that they could not wait until the defendant had gotten out of the state before taking possession of a part of his property.

The wife of the defendant testified that her daughter, Mrs. Dowell, stated to her several different times that the prosecutrix had told her that they had the father "going" now and that they would get their portion of the estate. This was told the mother after the father had gone to Oregon. The wife of the defendant testified as follows: "Q. When and where? A. Oh, she told me that at different times after papa was run off. She said it was some property they were after. Q. Go ahead and tell it. A. She said it was property they were after—John and Abi—and they said they had Mr. Clark going and that they would get their part of the estate and said that Mr. Fisher said so."

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The defendant testified in his own behalf and contradicted all of the statements of the prosecutrix implicating him in the crime of incest. He was supported in much of his testimony by the mother of the prosecutrix, and Haggard, the hired man, testified that he was in the room with the prosecutrix at the very time she claimed the act was committed for which the defendant was convicted. And because of his testimony, Haggard, at the request and at the demand of Bissell, the assisting prosecuting attorney, was arrested in the presence of the jury and taken from there and incarcerated in the city jail, and while there Bissell and the county attorney Baum visited him and had a conversation with him and informed him that they had come over to the jail to give him (Haggard) an opportunity to tell the truth, if he wanted to do so. Bissell was placed on the witness-stand by the defendant and questioned by Mr. Jones, and he testified as follows: "Q. I will ask you what conversation you did have with him [Haggard]. A. I went over to the city jail, and I went over with Mr. Jones, Mr. Jefferies and Mr. Baum, and I said: 'Young man, you seem to be up against it, and I have come, we have come over to give you an opportunity to tell the truth if you want to.' Q. Go ahead. What else was said, Mr. Bissell? A. He says: 'By God! You can't bluff me out here; I'm going to stick, and Jones says that you can't do nothing to me.' I think that was the conversation. Q. Did you ask him whether he told the truth on the witness-stand to-day or not? A. I told him I come to give him an opportunity to tell the truth at this time if he wanted to, and he refused to have anything further to do with me, relying upon Mr. Jones to get him out of the trouble that he was in."

It is most remarkable that the prosecuting attorney and his assistant should undertake to have a witness arrested during the progress of a trial in the presence of the jury and then go to the jail and undertake, as is clearly shown by the answers of Bissell, to intimidate him and if possible get him to admit that the testimony he had given on the stand was false. Bissell testified, "I told him I come to give him an opportunity to tell the truth at this time if he wanted to."

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This testimony clearly shows the purpose and design of Bissell and the prosecuting attorney to intimidate and brow-beat this witness and compel him to testify as they wanted him to. Bissell says, "to tell the truth," which means to testify as Bissell desired he should. Such conduct is reprehensible in any prosecuting officer and deserved the severest punishment that could be meted out to prosecutors who were thus prostituting their office.

After the court had learned of this conduct on behalf of the prosecuting attorney and Bissell, he called them before him privately and not in the presence of the jury, and told them in very plain English what he thought of their conduct in this matter. Under the constitution and laws of this state every person charged with crime is entitled to a fair and impartial trial, and when prosecuting officers undertake to prejudice a defendant's case, as was done in the case at bar, the plain provisions of the constitution and law are clearly violated and a new trial will be granted.

On the argument on request of counsel for defendant, they were permitted to file with this court the information filed against Haggard after he had been incarcerated in the city jail, as above stated. In that information Baum, as prosecuting attorney, charges the said Haggard with committing perjury in giving his testimony in the case at bar. That information was filed in the district court on the 11th of January, 1915, about nine months after Haggard had been incarcerated in the city jail, and thereafter on the 15th of January, 1915, the cause was dismissed on motion of the prosecuting attorney and the bondsmen of Haggard were released.

The enmity of the prosecutrix toward her father; the claim that she was fearful that he would kill her husband and her testimony that "I have done what I have to do—it was John's life that I done it for," in the face of the fact that she and her husband continued to visit the father every week after their marriage; the fact that the husband was desirous that the defendant purchase his ranch for three or four thousand dollars, and that the county attorney was so insistent when

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he ordered the defendant to leave the state that he give the prosecutrix and her sister, Mrs. Dowell, their share of his property—all of this evidence taken together indicates the real motive on which this prosecution was based.

The prosecutrix had charged two other persons in Washington with attempting to or having intercourse with her, and her reputation for truth and veracity, as shown by some witnesses, was bad. That two daughters of mature years, both married, would undertake to send their father to the penitentiary, as these daughters have done, shows their desperate disposition and character. Why would this prosecutrix go home to her father every week after she married and stay two or three days at a time if he were treating her as she testified he was?

However, upon a fair trial of this case, a jury must determine these facts; but the evidence clearly shows that there was so much prejudice and error injected into this record that a new trial must be had.

The giving of an instruction to the effect that the jury might find the defendant guilty on the testimony of the prosecutrix alone, whether or not the same is corroborated, is assigned as error. Said instruction is as follows:

“You are instructed that in a prosecution for incest, if the prosecutrix was the victim of force, fraud or undue influence so that she did not wilfully and voluntarily join in the incestuous act, actuated by the same motives as the defendant, that she cannot be regarded as an accomplice, and that if from her testimony you are satisfied beyond a reasonable doubt that the defendant is guilty of the crime charged, then you should find the defendant guilty regardless of whether or not the testimony of said prosecutrix is corroborated.”

This instruction was clearly error under the provisions of sec. 7871, Rev. Codes, which section is as follows:

“A conviction cannot be had on the testimony of an accomplice, unless he is corroborated by other evidence, which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense; and the corroboration is not sufficient, if it merely

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shows the commission of the offense, or the circumstances thereof."

The evidence shows that if the defendant is guilty, the prosecutrix was an accomplice. She was married, about twenty-two years of age when the act complained of is alleged to have occurred. She was living with her husband on a homestead during her married life, and as before stated, went every week to visit her father, the defendant, and she testified that almost on every visit her father was too intimate with her. Regardless of that she kept going there and on the night of January 14, 1914, she alleged this act again occurred. So the record clearly shows there was no force, fraud or undue influence exercised over her, but that she voluntarily committed the act, if the act were in fact committed.

Underhill on Criminal Evidence, sec. 382, states that a conviction will not be had for the crime of incest upon the uncorroborated testimony of the prosecuting witness. And again, at sec. 397, the author says: "The law regards both parties to the incestuous adultery as accomplices. Hence, the rule requiring the testimony of an accomplice to be corroborated is applicable to the testimony of either testifying against the other."

Under the facts of this case, it was clearly error for the court to give the above quoted instruction.

The same may be said of the instruction immediately following the above quoted instruction, since there is no evidence showing that force, fraud, threats or undue influence were used on the prosecutrix on the night of the 14th of January, when the illegal act was alleged to have been committed.

Where the testimony of the prosecutrix is contradictory or her reputation for truthfulness and veracity is impeached and the defendant testified and denied specifically the testimony of the prosecutrix and his testimony was corroborated by other witnesses, the testimony of the prosecutrix, standing alone and without corroboration, will not warrant a conviction. (*State v. Trego*, 21 Ida. 625, 138 Pac. 1124; *State v. Tevis*, 234 Mo. 276, 136 S. W. 339.)

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The evidence shows that intercourse could not have occurred without the consent of the prosecutrix. She is therefore an accomplice if the crime were committed. (*State v. Mercer*, 17 Tex. App. 465.) According to the prosecutrix's own testimony, this incestuous intercourse continued from the time she was about eleven years of age until she was about twenty-two years of age; that it was repeated once or twice a week during a period of about eleven years, and in the very presence of other members of the family, always in the very room where her own mother or brothers or sisters were sleeping. That this should have continued that period of time without the consent of the prosecutrix is to the ordinary mind unnatural, unreasonable and incredible. We cannot believe it possible that those acts could have occurred as testified to by the prosecutrix without her consent. The irresistible conclusion from all of the evidence is that she was an accomplice in the performance of the act, if it occurred, for which this defendant was convicted. As bearing upon this question, see *State v. Pate* (Tex. Cr.), 93 S. W. 556.

Under the facts of this case the court ought to have instructed the jury that according to the testimony of the prosecutrix she was an accomplice. We think the correct rule is laid down in that regard in the case of *Clifton v. State*, 46 Tex. Cr. 18, 108 Am. St. 983, 79 S. W. 824, a case similar in some respects to the one at bar. The illegal acts alleged there covered a period of some six or eight years and the prosecutrix denied that she engaged in the sexual intercourse with the same purpose and intent as the defendant; that she was neither desirous nor willing to do it; that she did so because she was under defendant's influence and whatever he did she thought would be right, and the court there charged the jury similarly to the charge above quoted, and the court said: "Now, the jury evidently understood from the charge that unless she engaged in the intercourse with the same desire as did the appellant, she would not be an accomplice. This is not the true criterion under the facts of this case. If she submitted to his embraces, as she says at intervals for a considerable period of time and kept silent,

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she would nevertheless be an accomplice, although she did not willingly enter into it with the same desire as did appellant." And the court held that said charge was error.

So under the facts of this case, the court ought to have instructed the jury that the prosecutrix, according to her own testimony, was an accomplice and that they could not find the defendant guilty upon the uncorroborated testimony of the prosecutrix. In other words, her testimony in regard to the illegal act must be corroborated.

For the foregoing reasons, the judgment must be reversed and a new trial granted, and it is so ordered, and the cause remanded for further proceedings in accordance with the views expressed in this opinion.

After the defendant was convicted and upon application of the defendant, the district judge issued a certificate of probable cause, and ordered that the defendant be admitted to bail in the sum of \$10,000 pending the appeal in the supreme court. The defendant was not able to give that amount of bail and is now confined in the state penitentiary. Under the provisions of sec. 6, art. 1, of the constitution of Idaho, excessive bail shall not be required in any case, and it is hereby ordered that the defendant be admitted to bail in the sum of \$2,500, the bond to be approved by the judge of the fifth judicial district, conditioned on his appearance for trial at the next term of the district court in Power county, and that he submit himself for sentence and judgment, provided he is found guilty upon a new trial.

Morgan, J., concurs.

Budge, J., did not sit at the hearing and took no part in the decision of this case.

Argument for Respondent.

(March 12, 1915.)

MABEL LEONARD, Respondent, v. JAMES H. BRADY
et al., Appellants.

[147 Pac. 286.]

**DEFAULT — PREMATURE ENTRY OF — PROCEDURE ON MOTIONS TO SET
ASIDE.**

1. A defendant is entitled to have a judgment formally vacated and set aside on the records by direct action of the court, upon proper application therefor, even though prior thereto the sustaining of a motion to set aside a default against such defendant has had the legal effect of vacating the judgment by implication.

2. Where a motion to set aside a default because prematurely entered has been filed and argued by a defendant, but is not decided, and such defendant files and argues a second motion to set aside said default, on the grounds of surprise, inadvertence and excusable neglect, and said second motion also prays that a judgment based on said default be vacated, an order of the district court, made upon motion of the plaintiff, striking from the files said second motion to set aside the default and vacate said judgment, is error.

APPEAL from the District Court of the Fourth Judicial District for Elmore County. Hon. Edward A. Walters, Judge.

Motion to strike motion to set aside default sustained. Defendant appeals. *Reversed.*

Sullivan & Sullivan and W. C. Howie, for Appellant, cite no authorities.

Daniel McLaughlin and Perky & Crow, for Respondent.

Since the order of the court setting aside the default gave the respondent time in which to answer or demur, the effect of setting aside such default was to set aside the judgment entered thereon. The vacating of the default vacated the judgment; this is a necessary implication; for a determination of a motion is not always express, but may be implied. (14

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Ency. Pl. & Pr. 171, and cases; *Sterling Bridge Co. v. Pearl*, 80 Ill. 251; *Houghton v. Milburn*, 54 Wis. 554, 12 N. W. 23, 11 N. W. 517; *Shepard v. Ogden*, 3 Ill. 257; *Home Flax Co. v. Beebe*, 48 Ill. 138; *Merchants' Ad. Sign Co. v. Los Angeles Bill Posting Co.*, 128 Cal. 619, 61 Pac. 277; *Winer v. Mast*, 146 Ind. 177, 45 N. E. 66.)

The default having been set aside, the second motion filed, but not presented, to again vacate such default and the judgment depending on it, was properly denied. The order of the court sustaining the motion to strike out respondent's motion is equivalent to a denial of the latter motion. (*Lang v. Superior Court*, 71 Cal. 491, 12 Pac. 306, 416; *White v. Morgan*, 119 Ind. 338, 21 N. E. 968; *Blemel v. Shattuck*, 133 Ind. 498, 33 N. E. 277; *Long v. Ruch*, 148 Ind. 74, 47 N. E. 156.)

Appellant had the right to place his motion to set aside the default on any grounds he saw fit to choose. He elected to set the default and judgment aside on the ground that service was premature. The order of the court setting aside such default, and by implication setting aside the default judgment, was an adjudication of the matter. (*Bernhard v. Idaho Bank & Trust Co.*, 21 Ida. 598, Ann. Cas. 1913E, 120, 123 Pac. 481.)

Conceding that the second motion made was a proper one, still the court did not abuse its discretion in denying it. A motion of this kind is addressed to the sound discretion of the court. (*Richards v. Richards*, 24 Ida. 87, 132 Pac. 576.)

DAVIS, District Judge.—In this case a default was entered by the clerk of the district court against Brady, and he filed a motion to set aside said default on the ground that it had been prematurely entered. Shortly before the hearing on said motion a default judgment was entered against Brady, of which he had no knowledge until the date of the hearing on said motion. After the argument of said motion and before it had been decided, Brady filed another motion to set aside the default against him, based on the ground of surprise, inadvertence and excusable neglect, supported by affi-

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davits and accompanied by an affidavit of merit, said second motion also praying that said judgment be vacated. Within a few days the district court entered an order sustaining the first motion to set aside the default, without knowledge that the second motion had been filed. The respondent thereupon made a motion to strike Brady's second motion to set aside the default, containing the motion to vacate the judgment, on the ground that said default had already been set aside. Said motion to strike from the files being granted, this appeal is from said order of the district court.

It was error for the court to strike the motion in its entirety and the affidavits from the files, because a defendant is entitled to have a judgment formally vacated and set aside on the records by direct action of the court, upon proper application therefor, even though prior thereto the sustaining of a motion to set aside a default against such defendant has had the legal effect of vacating the judgment by implication. A plaintiff has no right to have a judgment standing upon the records against a defendant if in fact such judgment is void. A motion to vacate such judgment is a proper procedure. Where a motion to set aside a default because prematurely entered has been filed and argued by a defendant, but is not decided, and such defendant files another motion to set aside such default on the grounds of surprise, inadvertence and excusable neglect, accompanied by affidavits, and said motion also prays that a judgment based upon said default be vacated, said court should deny the motion to strike and should hear and determine the motion to vacate the judgment. A district court is not justified in striking a motion from the files where the purpose of the motion is to set aside a default and also to vacate a judgment, even though the motion to set aside the default is a repetition and cannot properly be considered at that time, since the motion to vacate the judgment is a separate and distinct matter entitled to a hearing on its merits. The order of the district court appealed from is reversed and the case is remanded for further proceedings herein consistent with this opinion, and in the opinion of this

Points Decided.

court in the case of *Mabel Leonard v. James H. Brady et al.*, *post*, p. 78, 147 Pac. 284. Costs on appeal awarded to appellant.

Budge and Morgan, JJ., concur.

(March 12, 1915.)

MABEL LEONARD, Appellant, v. JAMES H. BRADY
et al., Respondents.

[147 Pac. 284.]

DEFAULT—PREMATURE ENTRY OF—SHOWING REQUIRED TO SET ASIDE—
DISCRETION OF TRIAL COURT—IRREGULARITY IN SERVICE OF SUM-
MONS.

1. It is permissible for the supreme court to determine whether or not a default should have been set aside by a district court for reasons not assigned in the motion to set aside such default, where it appears that the district judge considered such reasons at the suggestion of the party resisting such motion, and that they were unknown to the moving party until the date of argument on the motion, and that the moving party showed due diligence in endeavoring to ascertain all the facts prior to that date.

2. A district judge exercises a reasonable discretion in setting aside a default where it appears from the date shown by the certificate of service of summons signed by a deputy sheriff, and also from his affidavit made subsequently, that sufficient time had been allowed for the appearance of a defendant before default was entered against him, and the contrary appears by another affidavit of the same officer showing another date; and it also appears that at the time the clerk entered such default it was based upon a certificate of service of summons signed by a deputy sheriff and accompanied by an unsigned and unsealed paper purporting to be a copy of such summons, but which had not been substituted as an original by the court.

APPEAL from the District Court of the Fourth Judicial District, in and for Elmore County. Hon. Edward A. Walters, Judge.

Argument for Appellant.

Order setting aside a default entered by clerk of the lower court against defendant. *Affirmed.*

Perky & Crow and Daniel McLaughlin, for Appellant.

There is no hint in the motion, or the order, that either the manner or fact of service was in any way called in question. Respondent was and is prevented from raising under his motion any other question than that of the date of service. Every other point (if there are other points involved) is waived. (14 Ency. Pl. & Pr. 117, and cases cited.)

"Not only must a party assign a ground for his motion, but he must assign all of the grounds for the relief sought which he may have, and objections known to exist and not raised at the time of the motion may be deemed waived." (14 Ency. Pl. & Pr. 119, and cases cited; *Bronzan v. Drobaz*, 93 Cal. 647, 29 Pac. 254; *Clarke v. Mohr*, 125 Cal. 540, 58 Pac. 176; *Harder v. Harder*, 26 Barb. (N. Y.) 409; *Corwith v. State Bank*, 8 Wis. 376; *Gould v. Moss*, 158 Cal. 548, 111 Pac. 925; *Nevada Co. v. Farnsworth*, 89 Fed. 164.)

No affidavit of merits was filed with the motion to set aside the default. Such affidavit is required. (*Vollmer Clearwater Co. v. Grunewald*, 21 Ida. 777, 124 Pac. 278; *Hall v. Whittier*, 20 Ida. 120, 116 Pac. 1031; *Holzeman v. Henneberry*, 11 Ida. 431, 83 Pac. 497.)

The proof necessary to overthrow the return must be clear and unequivocal. (32 Cyc. 514, and cases cited.)

The function of a summons is to inform the party against whom the action has been brought that he is being sued, and the nature of the suit brought against him, and the time within which he must appear and defend. An original summons performs this function as well or better than a copy. Any such irregularity as that complained of is immaterial and will not justify the setting aside of the service. (32 Cyc. 460, and cases cited; *McDaniel v. Scurlock*, 115 N. C. 295, 20 S. E. 451.)

The requirement of the statute that service shall be made by the delivery of a copy is evidently directory merely. (*Clemmons v. State*, 5 Okl. Cr. 119, 113 Pac. 238.)

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"It is the fact of service which gives the court jurisdiction, and not the proof of service." (*Call v. Rocky Mountain Bell Tel. Co.*, 16 Ida. 556, 133 Am. St. 135, 102 Pac. 146; *Tewalt v. Irwin*, 164 Ill. 592, 46 N. E. 13.)

W. C. Howie and Sullivan & Sullivan, for Respondent.

There are cases in which motions may be granted for reasons not assigned. (14 Ency. Pl. & Pr. 117, and cases cited in note; *Hancock v. Youree*, 25 Okl. 460, 106 Pac. 841; *Skinner v. Terry*, 107 N. C. 103, 12 S. E. 118.)

The practice of rendering judgments against the defaulting defendant where there is no proper proof of service upon him is a dangerous one and should not be tolerated. (*Vermont L. & T. Co. v. McGregor*, 5 Ida. 510, 51 Pac. 104; *Strode v. Strode*, 6 Ida. 67, 96 Am. St. 249, 52 Pac. 161; *Applington v. G. V. B. Min. Co.*, 6 Ida. 216, 55 Pac. 241; *Mills v. Smiley*, 9 Ida. 317, 76 Pac. 783; *Call v. R. M. Bell T. Co.*, 16 Ida. 551, 133 Am. St. 135, 102 Pac. 146.)

"It is only where a judgment by default has been regularly taken that an affidavit of merits is required to open it; if irregular, no merits need be shown." (1 Ency. Pl. & Pr. 355; *Norton v. Atchison etc. R. R. Co.*, 97 Cal. 388, 33 Am. St. 198, 30 Pac. 585, 32 Pac. 452; 2 Ency. L. & P. 717, and cases cited; *Hole v. Page*, 20 Wash. 208, 54 Pac. 1123; *Browning v. Roane*, 9 Ark. 354, 50 Am. Dec. 218; *Shankoltzer v. Thompson*, 24 Okl. 198, 138 Am. St. 877, 103 Pac. 595.)

When, after order for publication of summons against an absent defendant has been duly made, the summons is personally served on such absent defendant out of the state, such service does not become complete until the expiration of the time prescribed in the order for publication; and a default judgment entered against him during said time is void and will be reversed on appeal. (*Bowen v. Harper*, 6 Ida. 654, 59 Pac. 179.)

DAVIS, District Judge.—This action is pending on an appeal by the plaintiff, Mabel Leonard, from an order of the district court setting aside a default entered by the clerk

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against the defendant, James H. Brady. It appears that an *alias* summons was issued by the clerk, but that no record of that fact was made on the register of actions or otherwise in the clerk's office.

The original *alias* summons was served on Brady by a deputy sheriff of Bannock county and the officer's return of service was made on a purported copy of the *alias* summons not signed or sealed by the clerk, and no order was ever made by the district court authorizing the substitution of the copy for the original *alias* summons. The certificate of service made by the deputy states that service was made on March 14, 1914. Some two months after making the certificate the officer made an affidavit to the effect that the summons had been served March 15, 1914. The attorney for Brady thereupon filed a written motion to set aside the default upon the ground that it had been prematurely entered, which would have been true had service been made upon March 15th, but if made upon March 14th, the forty days allowed by law had expired when default was entered. Subsequently the officer's certificate of service was shown to him and he repudiated the first affidavit and made another to the effect that the date named in the certificate was the actual date upon which the *alias* summons had been served.

During the argument, when the motion came on for hearing before the district judge, a purported copy of the *alias* summons containing the return of the officer was produced by the attorney for the plaintiff, together with the second affidavit of the officer, and the attorney for the plaintiff then made a motion that certain defects in the return be corrected. The attorney for Brady had not seen such copy of the *alias* summons theretofore, nor had a copy of the deputy's second affidavit nor of plaintiff's motion to correct the defects in the record with reference to service and his affidavits in support thereof been served upon the defendant, but the entire matter was apparently considered by the judge nevertheless. He thereafter denied plaintiff's motion to correct the return of service, and sustained defendant's motion to set aside the de-

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fault, ruling "that the clerk did not have authority to enter and should not have entered the default of the defendant, James H. Brady, at that time, and the said defendant, James H. Brady, is given twenty days from the date hereof in which to answer and plead herein."

From said order setting aside the default against Brady the plaintiff appealed to this court, contending that the lower court erred in making its order setting aside the default of James H. Brady.

Appellant contends that there is but one question for the supreme court to decide, and that is whether or not under the showing made the district judge had any discretion to find that the time allowed defendant to answer had expired.

Respondent claims that the district judge considered the circumstances affecting the service and that this court may also properly determine whether or not the clerk had authority to enter such default at the time it was entered, although the motion to set aside the default referred only to the insufficiency of time as a ground for setting aside the default. It is asserted that in view of the manner in which such second ground first came to the attention of the attorneys for Brady at the hearing on the motion, and the fact that it was before the district judge at that time, justifies this court in determining on appeal whether or not such ground was sufficient to justify the trial court in setting aside the default. We concur in this view.

Ordinarily a court should sustain the official certificate of an officer supported by his affidavit, rather than his affidavit alone to the contrary, but the entire showing in this case surely vested some discretion in the trial judge, and it does not appear that there was such an abuse of such discretion as to require a reversal of his action.

Where a district judge considers matters in support of a motion to set aside a default, first brought to his attention through acts of the plaintiff when resisting such motion, which facts thus came to the knowledge of the moving party for the first time at the hearing, and were therefore not assigned as grounds in support of his motion to set aside the

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default, it is proper for the supreme court to determine whether or not such matters appearing in the record on appeal furnish sufficient grounds to sustain the action of the district judge in granting such motion. And where a clerk of the district court has entered a default against a defendant based on a certificate of service by a deputy sheriff attached to an unauthenticated copy of an *alias* summons against such defendant, and the clerk had no record in his register of actions or otherwise to show that the original of such purported copy of the *alias* summons had been actually issued in due form, and the court refused to allow the return of service to be corrected, or the copy of the *alias* summons to be substituted for the original, such clerk *did not have authority* to enter default against such defendant at that time. Sec. 4143, Rev. Codes, requires the return of service to be accompanied by the original summons instead of by a copy thereof, and while it is not intended to hold that service duly certified upon an authenticated copy would not justify a default, it is clear that where there is no record in the register of actions of the issuance of the original summons or otherwise in the office of the clerk, and there is no valid summons accompanying the certificate of service, the clerk has no authority to enter a default upon delivery to him of an unsigned and unsealed copy of a purported *alias* summons containing a return thereon. He has no way of knowing from the record whether or not such an *alias* summons had ever been issued, and authority to determine whether or not a paper tendered as a copy of an original instrument is a true copy of such instrument is vested in the district court alone by sec. 4923, Rev. Codes. And while the service of an original summons upon a defendant would be equally as effective as a copy to give him notice of the action and the time within which he should appear, the record should show such service in a more formal manner than in this case before the entry of a default against him by the clerk would be authorized.

The district court did not abuse its discretion in vacating said clerk's default, and the order appealed from will not be disturbed. Costs on appeal awarded to respondent.

Budge and Morgan, JJ., concur.

Points Decided.

(March 16, 1915.)

NAMPA & MERIDIAN IRRIGATION DISTRICT, Appellant, v. W. M. BRIGGS, Respondent.

[147 Pac. 75.]

IRRIGATION AND WATER RIGHTS—OWNERSHIP—ANNUAL MAINTENANCE—CONSIDERATION EXPRESSED IN DEED—TITLE—PURCHASE—CONSTITUTIONAL LAW—IRRIGATION DISTRICT—PUBLIC SERVICE CORPORATION—COMMON CARRIER—MUTUAL CO-OPERATIVE COMPANY—PREFERENTIAL RIGHT—POWER OF EMINENT DOMAIN—RECITAL IN DEEDS—USE OF WATER FOR IRRIGATION—POSSESSION—NOTICE—TENDER—DEPOSIT IN COURT—JUDGMENT.

1. The facts in this case considered and held to not support the contention that appellant and respondent are co-owners of the irrigation system; that appellant's ownership of said system is established by the evidence, and that respondent is the owner of a right to two cubic feet of water per second of time to be delivered through the ditches and canals thereof.

2. The deeds executed by the predecessors of appellant and respondent examined, and it is found that the agreement to pay the sum of \$12 per annum on the water right described in each of said deeds as an assessment for the management and maintenance of said irrigation system is a part of the consideration upon which said deeds are based.

3. Appellant became the owner of the irrigation system in question after contracts had been entered into whereby respondent's predecessor and his successors in interest were to enjoy the use of two cubic feet of water per second of time and were to pay \$24 per year toward the upkeep of the irrigation system. It was optional with the appellant to make the purchase or not. Having elected to purchase, it could acquire no greater interest than its vendor had and must take its title burdened with said contracts. Having purchased the system it might have acquired respondent's property right by purchase or condemnation and might have brought him into the district upon equal terms with its members, but it did not do so, and his interest granted by these contracts is property that may not be confiscated, or taken, without payment of just compensation.

4. The water right contracts entered into between the predecessors in interest of the appellant and respondent were so entered into before the adoption of the constitution of Idaho. There was noth-

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ing in the law of the territory of Idaho prohibiting such contracts, and sec. 10, art. 1 of the federal constitution prohibits states from passing laws impairing the obligation of contracts.

5. The appellant, an irrigation district created under the laws of the state of Idaho, is not a public service corporation in the sense that it is a common carrier, to any other or greater extent than the term implies when applied to its own membership, and when confined to the business of carrying water for the irrigation of lands within its own district. It is a mutual, co-operative corporation, organized not for profit, engaged in distributing water to its members for use upon lands within its district.

6. The fact that such a corporation as appellant is may exercise the power of eminent domain does not, of necessity, constitute it a public service corporation in the sense that the public may exact any service from it.

7. It appears from the evidence and the stipulation of the parties that in deeds by which title to the irrigation system was granted to certain of appellant's predecessors in interest and through whom it deraigned title, there were reserved certain water rights, and that among said rights so reserved were those now claimed by respondent; also that at the time appellant purchased, and for a long time prior thereto, respondent was in possession of his land and was using water thereon from the canal pursuant to the stipulation in his deeds. *Held*, that these are facts, knowledge of which ought to put a prudent man on inquiry, which would have readily disclosed the true condition of respondent's claim, whether his deeds were so acknowledged as to entitle them to go of record or not.

8. The respondent, before the commencement of the action, tendered to the appellant and deposited in court \$120, in which sum he is indebted to appellant; the appellant is entitled to judgment against the respondent in said amount, and the respondent is entitled to judgment against the appellant, under sec. 4909, Rev. Codes, for the amount of his costs incurred in the district court.

APPEAL from the District Court of the Third Judicial District for Ada County. Hon. Carl A. Davis, Judge.

Action to recover from defendant his *pro rata* share for the management, maintenance and repairs of appellant's canal system. Judgment for defendant. *Modified*.

H. E. McElroy, for Appellant.

Deeds of this character, to a part only of the water carried by the canal, clearly bring the grantee and the owners of

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the remainder of the water carried by the canal into the relation of tenants in common in water rights. (*Frost v. Alturas Water Co.*, 11 Ida. 294, 81 Pac. 996.)

Respondent relies upon *Jackson v. Indian Creek Reservoir etc. Co.*, 16 Ida. 430, 101 Pac. 814, and *Knowles v. New Sweden Irr. Dist.*, 16 Ida. 217, 101 Pac. 81. In those cases the court was only declaring the law in relation to contracts which attempted to fix charges for the use of water. The owners of water rights under such deeds as these in controversy are tenants in common with this appellant in this canal system, and we are no more under obligation to maintain this canal system for their benefit than that they should maintain it for us. It is merely a question of prorating the expense. This court has passed upon cases of this character in which the titles of grantees of undivided interest in water rights were respected and recognized in the following cases: *Nampa & Meridian Irr. Dist. v. Gess*, 17 Ida. 552, 106 Pac. 993; *Idaho Fruit Land Co. v. Great Western Beet Sugar Co.*, 18 Ida. 1, 107 Pac. 989.

The annual maintenance is a duty which rests upon the owner of a water right as an incident of such ownership; it is not part of the title, neither can it be the subject of a covenant running with the title to the property; agreements in relation thereto only bind the parties to such agreements, and cannot affect the title to other and different rights from the same canal system.

The Central Canal & Land Co. could and possibly did impose that obligation on itself; but could not make such an obligation forever follow the title to water rights owned by the public and in regard to which the canal owner is "but an agent of the public for the distribution of such waters to such members of the public as may apply for them and pay him the legal charge for the service rendered by him." (*Leavitt v. Lassen Irr. Co.*, 157 Cal. 82, 106 Pac. 404, 29 L. R. A., N. S., 213.)

This same question of preferential rights was passed upon by the circuit court of appeals in *Boise City Irr. & Land Co. v. Clark et al.*, 131 Fed. 415, 65 C. C. A. 399, where the court

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held directly that the Boise City Irr. & Land Co., our predecessor in interest, could not lawfully fix a rate required to be charged to the users of water to pay for the maintenance properly chargeable to this land. If our predecessors in interest could not lawfully charge up their maintenance for the Gess tract to the other lands to which they supplied water, as the court held in that case, much less can this district do so, limited as it is by the law regulating irrigation districts. The Boise City Irrigation & Land Co. was a private corporation; this district is a public one. In *Daly v. Josslyn*, 7 Ida. 657, 65 Pac. 442, the court held that specific performance of a contract in relation to water rights could not be decreed. In other words, the contract was a personal one, and no person could be held unless he became a party thereto.

The law is well settled that the owners of water rights carried through the same ditch are legally liable to contribute *pro rata* to the maintenance thereof. (Long on Water Rights, sec. 75. *Nampa & Meridian Irr. Dist. v. Gess*, 17 Ida. 552, 106 Pac. 993; *Shelby v. Farmers' etc. Ditch Co.*, 10 Ida. 723, 80 Pac. 222.)

"Water appropriated for distribution and sale is, *ipso facto*, devoted to a public use, which is inconsistent with the right of the person so appropriating it to exercise the same control over it that he might have exercised if he had never so appropriated." (*McCrary v. Beaudry*, 67 Cal. 120, 7 Pac. 264.)

The charge for the use of the water when fixed under sec. 6, art. 15, of the constitution, is subject to modification from time to time. (*Green v. Jones*, 22 Ida. 560, 126 Pac. 1051.)

The amount which the canal owner may lawfully charge for such use was as definitely fixed by statute prior to the constitution as by the constitution itself. Sec. 6, art. 15, merely authorizes the legislature to provide a method of determining the charge; and, as stated in sec. 2, art. 15, the franchise can only be exercised "by authority of and in the manner prescribed by law."

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Wood & Driscoll and Martin & Martin, for Respondent.

This case is controlled absolutely by the decisions of this court in *Knowles v. New Sweden Irr. Dist.*, 16 Ida. 217, 101 Pac. 81; *Jackson v. Indian Creek Reservoir etc.*, 16 Ida. 430, 101 Pac. 814, and *Nampa & Meridian Irr. Dist. v. Gess*, 17 Ida. 552, 106 Pac. 994.

In *Knowles v. New Sweden Irr. Dist.* the deed and agreement under which the plaintiff claimed is set forth in part in the opinion of the court, and in the important features is nearly identical with the deeds and agreements in controversy.

The deed construed in *Jackson v. Indian Creek Reservoir, etc.*, appears to be practically a duplicate of the deeds in controversy.

Since the decision and application for rehearing in this case, this court has decided the case of *Riverside Irr. Dist v. Black*, 25 Ida. 98, 136 Pac. 611. In the latter case rights under a contract have been sustained where water was reserved with a right to carry the same through a fixed portion of a canal system; and, while the court under the contract sustained the trial court in prorating the cost, it concluded the opinion as follows: "It is clear to us, on the other hand, that this reserved water cannot be subject to any charge other or greater than that stipulated and provided for in the deed which reserved that right"; citing in support thereof all of the cases upon which we relied on the original argument to sustain the validity of the contract and reservations in the various deeds through which the district acquired title to this canal property.

In connection with the status of irrigation canals and irrigation districts in this state we call attention to the former decisions of this court in *Wilterding v. Green*, 4 Ida. 773, 45 Pac. 134; *City of Nampa v. Nampa & Meridian Irr. Dist.*, 19 Ida. 787, 115 Pac. 979.

MORGAN, J.—This case was before the court at the April term, 1913, and a decision was filed herein on July 16, 1913. Upon a petition therefor, a rehearing was granted and the case has been reargued and again submitted for decision.

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This action was commenced by Nampa & Meridian Irrigation District to collect from the respondent, Briggs, his *pro rata* share of the expenses necessarily incurred for the repair and maintenance of the ditches and canals of the irrigation system owned and controlled by said district. It appears that said district has delivered water to the respondent during the years 1906, 1907, 1908 and 1909 and that respondent has failed, neglected and refused to pay his *pro rata* share of the expense of the maintenance of the canal system during said years. The respondent alleges as a defense that he is the owner of the water right for his land which is irrigated from said system, and that he purchased the same from the appellant's predecessor, the Central Canal & Land Company, paying therefor the sum of \$1280, and that he received two deeds, each conveying one water right consisting of one cubic foot of water per second of time, and that by stipulation in said deeds he is only required to maintain the ditch or lateral which conveys the water from the said company's main canal to his land, and that he has no interest or part in said main canal, which belongs to the appellant, and that under his deeds he is released from ever contributing toward the repair or maintenance of the main canal more than \$12 per annum for each cubic foot of water, which amount, for the years 1906, 1907, 1908, 1909 and 1910, he has heretofore tendered to appellant and tenders into court with his answer.

The trial court, after hearing, made findings of fact and entered judgment in favor of respondent, holding that the provision contained in said deeds whereby the predecessor in interest of the respondent agreed to pay \$12 per annum toward the management and maintenance of said canal system for each water right of one cubic foot of water per second of time, was valid and binding upon the appellant, being the successor in interest to said Central Canal & Land Company in said canal and certain water right contracts. The appeal is from the judgment.

The main question is whether the appellant irrigation district has a right to recover from the respondent his *pro rata*

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share per annum of the expense of the management and maintenance of the said canal system, or whether appellant is bound by the stipulation in said deeds which required the respondent to pay but \$12 for the delivery of a cubic foot of water per second of time. In other words, whether an irrigation district, which is the successor in interest to a canal company that acquired water for sale, rental and distribution, is bound by the agreements of such company limiting the amount which one or more of its grantees, who hold by grants prior to the transfer to the irrigation district, shall pay by way of maintenance upon the system.

The following facts appear from the record: One Wm. B. Morris, upon August 7, 1877, recorded his water location notice whereby he claimed sufficient water from Boise river to fill a ditch or canal eight feet wide at the bottom and twelve feet wide at the top and three feet in perpendicular depth, said water to be diverted from the south side of Boise river. Said water was located for milling, mining and agricultural "and for purposes of irrigating and subjecting waste and desert land to settlement, use and cultivation." Thereafter Morris died about the year 1880 and his title in and to said water right and ditches descended to and was decreed by the probate court of Ada county to Lavina T. Morris and William H. Ridenbaugh. Thereafter on August 20, 1888, said Ridenbaugh located and claimed 30,000 inches of the water of Boise river, measured under a four-inch pressure, which location was made as an additional one to the one made by said Morris, above mentioned, which water was to be used for irrigation, domestic and mechanical purposes and on desert lands, below said point of diversion. Thereafter on October 1, 1888, said Ridenbaugh and Morris sold and conveyed, by warranty deed, the two water rights above mentioned, excepting and reserving therefrom certain water rights therein mentioned, to the Central Canal & Land Company, a corporation organized for the purpose of irrigating and reclaiming desert lands by the sale, rental or distribution of water. On May 29, 1890, said Central Canal & Land Company conveyed, by warranty deed, to George W.

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Morrill said water rights and ditches, excepting and reserving therefrom certain water rights. Said Morrill and wife conveyed said canals and ditches on August 6, 1890, to the Boise & Nampa Irrigation Land & Lumber Company, a corporation organized under the laws of the territory of Idaho, for the purpose of irrigating and reclaiming arid and desert land and for selling, leasing and renting water for any and every purpose.

It appears from the record that thereafter said water rights and ditches were sold at least twice at sheriff's sale; once on mortgage foreclosure, and once on execution, but no question is raised on this appeal in regard to the effect of said sales. Said property was bid in on the foreclosure and execution sales by one Geo. B. Forman in December, 1896, and the sheriff's deeds were thereafter executed to said purchaser, conveying to him said property. Thereafter and on April 20, 1899, said Forman sold and conveyed said canal system to the Boise City Irrigation Land & Lumber Company, a corporation organized under the laws of the state of New Jersey. Thereafter, in 1905, the Boise City Irrigation Land & Lumber Company conveyed said water rights and canals to the appellant herein, the Nampa & Meridian Irrigation District, it being an irrigation district organized under the laws of this state.

From the foregoing it appears that said water was located and acquired by its successive owners for sale, rental and distribution, and that said appellant corporation is a co-operative company organized for the purpose of managing and conducting said system for the irrigation of lands within said district. Also it appears from the record that it costs many thousands of dollars each year for the maintenance of said system and that such sum is raised by prorating the expense among the water-users in said district according to law. The record also shows that the appellant, the irrigation district, in the year 1909 expended at least \$12,000 in repairing a break in its canal, and that in order to render the canal safe for use it was compelled to cement a portion of it, which work was in progress at the time this action was commenced, and

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that at said time said repairs had cost the sum of \$27,000. That the cost of maintenance was such that the assessment made for that purpose was \$1.00 per miner's inch per annum for water delivered to the users. Aside from this, all users who did not own private water rights have been assessed annually \$1.25 per miner's inch of water received by each, for the purpose of paying the interest on the bonded indebtedness of the district, which indebtedness arose from the purchase of the water rights and canals owned by said district.

It further appears that the Central Canal & Land Company, predecessor in interest to the appellant, issued certain water right certificates while it was the owner of the property, which contained, among others, the following provision: "The said Central Canal & Land Company upon the surrender of this certificate properly signed and indorsed, promise and agree to execute a good and sufficient deed in manner and form as now adopted by said Company." It further appears that while said irrigating system was the property of said Central Canal & Land Company water right certificates were, for a valuable consideration, issued to the predecessor in interest of the respondent, covering two water rights of one cubic foot per second of time, approximately fifty miner's inches, each. Water right deeds were thereafter issued by said Central Canal & Land Company to Frank De Cloedt, predecessor in interest of and grantor of respondent, one dated June 15, 1889, conveying one cubic foot of water per second of time, and the other dated June 10, 1891, conveying a like amount of water to De Cloedt, pursuant to the water right certificates above mentioned.

It is maintained by the appellant that the respondent, owing to the foregoing facts and the recitals in said deeds, is the owner of an interest in said canal system and that the appellant and respondent are co-owners thereof.

An examination of the deeds in question and consideration of the facts above stated do not bear out this contention, but, upon the contrary, lead to the conclusion that it was not the intention of the Central Canal & Land Company and De Cloedt to own the property in common, and that it was their

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intention that De Cloedt should have a perpetual right to two cubic feet of water per second of time to be delivered through the ditches and canals of the said company.

It is recited in each of said deeds: "That in consideration of the stipulations herein contained and the payments to be made as hereinafter specified, and of the sum of \$640 in hand paid by the party of the second part, the receipt of which is hereby acknowledged by the said first party, the said first party has granted, bargained, sold and conveyed and by these presents does hereby grant, bargain, sell, convey and confirm unto the said second party, his heirs or assigns, one water right to the use of water flowing through the canal of said first party. . . . "

The first numbered paragraph of said deeds provides that the first party shall keep and maintain said canal in good order and condition and in case of accident to, or breach in, or damage to the same, to repair it.

The second paragraph provides that the second party, his heirs, executors, administrators and assigns shall pay said first party, its successor or assigns, on or before the first day of May in each year, the sum of \$12 on each water right as assessment for the management and maintenance of said canal for the ensuing year. It also provides that the first party may establish and enforce such rules, by-laws and regulations and provide and declare such penalties and forfeitures as it may deem necessary and expedient for the purpose of enforcing and collecting said assessments.

By construing the said second paragraph and the portion of the deeds relative to the consideration together it will be readily seen that the stipulation limiting the amount to be paid toward the up-keep of the canal is a part of the consideration for the contract, for the payment of \$12 a year upon each water right is the only payment which remained for the second party to make. The assessment of \$12 a year upon each water right must be the payments referred to in the deeds, where it is said: "In consideration of the stipulations herein contained and the payments to be made as hereinafter specified."

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The third paragraph specifies the particular tracts of land upon which the water shall be used for irrigation and that it shall be used upon no other land and for no other purposes, other than domestic purposes; that it shall be used only during the irrigating season and that under no circumstances shall said water or any portion thereof be used for mining, milling, mechanical power "or for any other purpose not directly connected with or incidental to the purposes first herein mentioned."

The fourth paragraph provides that the second party, his heirs or assigns, shall not permit said water or any portion thereof, to be furnished as aforesaid, to run to waste, and that should any of it run to waste the first party shall have the right to go upon the lands of the second party and to construct and maintain canals and ditches to convey such water to any other point the first party may desire. It also provides that as soon as sufficient water has been used for the purposes allowed, the second party shall notify the first party that a portion or all of said water may be shut off, and shall give timely notice when the water is needed again.

The fifth paragraph relates to the manner of the delivery of said water by the first party into the lateral ditch or canal provided by the second party; and the sixth and seventh paragraphs provide that the first party shall not be liable for damage for shortage of water under certain circumstances therein stated, but that said first party may establish and enforce such rules and regulations as it may deem necessary and expedient to protect the rights of water users.

In the eighth paragraph, the second party waives all damages by reason of leakage, seepage, overflow, etc., and grants a right of way upon, across and over his lands for the purpose of excavating, constructing and maintaining the canals and laterals of the first party, and grants the right of ingress and egress upon said lands to construct, excavate, operate and maintain such canals and laterals and to keep them in repair.

The ninth paragraph provides that the first party shall deliver said water at such point or points along the line of

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its canal as it may determine to be the most practicable, and it shall have the right to regulate the supply of said water and that the headgates, boxes, flumes, weirs or other arrangements through which the water shall be drawn from said canal shall be placed in position by the first party, but at the cost and expense of the second party and other parties jointly who may be receiving water at the same place with the second party.

The tenth paragraph fixes the rights of the parties in the event of the failure of the second party to comply with the stipulations in the deeds to be by him kept and performed.

In the deed dated June 10, 1891, it is recited:

“This deed is given upon surrender & cancellation of $\frac{1}{2}$ water right certificate No. 6 and 7 issued by The Central Canal & Land Co. on the 4th day of January, 1890, and the land to be irrigated under this deed is a part of the Nine Hundred & twenty Five acres Reserved by Central Canal & Land Co. in Deed made to George W. Morrill.”

The deeds are executed by both parties, and it may be said that if it was their intention to be cotenants in the system or that the second party should be a co-owner with the party of the first part in its rights of way, canals, ditches or other property, or if he was to have anything else than a perpetual right to a specified quantity of water to be used for a specified purpose upon specified lands and to have the same delivered through the irrigation system of the first party upon payment of \$12 per annum for each cubic foot of water per second of time toward the maintenance of the system, nothing contained in said deed or the record so indicates.

Frost v. Alturas Water Co., 11 Ida. 294, 81 Pac. 996, is cited by appellant in support of the theory that the parties to this action are tenants in common of the water carried by the canal in question. The case is not in point. In the *Frost v. Alturas Water Company* case a number of plaintiffs, appropriators of water from a stream, joined in a suit against a number of other appropriators of water from said stream for the purpose of procuring a decree quieting the title of the respective parties to the water of said stream and its trib-

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utaries. While the court in that case quoted from Farnham on Water and Water Rights, vol. 3, sec. 687b, to the effect that the relation of prior and subsequent appropriators of water of a stream is that of tenants in common, the respective rights of whom a court of equity has the power to ascertain and determine, and to fix the time at which each may have the use of the water, in this case the relation of the parties has been fixed by the contract of their predecessors, and the question presented for determination is as to the validity of this contract and, if found to be valid, its effect.

The case at bar, in principle, resembles that of *Knowles v. New Sweden Irr. Dist.*, 16 Ida. 217, 101 Pac. 81, as that case was at first presented to this court and decided and as the decision thereof stood before rehearing. In that case a deed was given by the Great Western Canal Construction Company, the predecessor in interest of New Sweden Irrigation District, the respondent, to one Scott, the predecessor in interest of Knowles, the appellant. The court in that case clearly analyzed the situation as follows:

“It seems to us that this question may be simplified by briefly stating some fundamental principles that must necessarily arise in the consideration of this matter and upon which its correct determination must necessarily rest. In the first place, appellant’s predecessor in interest, Scott, had a clear and undisputed right to contract with the Great Western Canal Construction Company for the purchase of a water right sufficient to irrigate his tract of land. This he did, and for that right he paid \$1,800. Under it he and his successors in interest were entitled to the perpetual use of water sufficient to irrigate his tract of land, not exceeding 250 inches per second, upon paying the fixed and stipulated price of \$1 per acre as rental therefor. Under the laws of this state a water right is real estate. (Sec. 2825, Rev. Stats.; *Ada Co. etc. Co. v. Farmers’ etc. Co.*, 5 Ida. 799, 51 Pac. 990, 40 L. R. A. 485; *McGinnis v. Stanfield*, 6 Ida. 372, 55 Pac. 1020; *Hall v. Blackman*, 8 Ida. 272, 68 Pac. 19.) The conveyance of this property, having been made a matter of record, became notice to subsequent purchasers from the Great Western

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Canal Construction Company. The respondent, New Sweden Irrigation District, has a right to organize itself into a *quasi*-municipal corporation for the purpose of purchasing, acquiring or constructing canals, ditches, water rights and a canal system. This it had done. It had a right to purchase the Great Western Canal system, and the Great Western Canal Construction Company had a right to sell this property. The irrigation district having the right and capacity to purchase, and the canal company having the property and the right to dispose of the same, the latter could lawfully sell to the irrigation district, which it has done. The canal company could not sell any greater title than it possessed, and when the irrigation district purchased, it could neither purchase nor acquire any greater title or interest than its grantor owned and possessed. When it purchased this canal system, it purchased it subject to and burdened with the rights and equities of the appellant's grantor."

The court further held that the lands of the appellant could not be assessed for the purchase of the irrigation system, since he already owned his water right, without first condemning his right, or otherwise acquiring it, saying: "Now, it is clear to us that for the purchase of this system respondent could not legally and lawfully assess appellant's property until such time as it had either purchased or acquired his water right and privileges and reduced him to a common level, and placed him on a common footing with the other land owners and water consumers in the district. To assess appellant for the purchase of a water right and canal system upon the theory that his lands were to be benefited thereby on account of receiving water from such system is wholly unjustifiable, where the appellant was already the owner of sufficient interest, title and claim in the water right and canal system for his own purposes, and where the purchase was not to be received by him either in whole or part, but was to be received wholly by a third party. If, on the other hand, his water right had been purchased by the irrigation district or condemned by it, then it would have been emi-

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nently proper to assess his lands proportionately according to the benefits received for the purchase or condemnation price. In this connection it must be borne in mind that there is a wide and well-defined distinction between the rights and appurtenances appellant had acquired under his grantor's contract with the Great Western Canal Construction Company and the rights that he acquired under sec. 4 of art. 15 of the constitution, which constitutional provision works a perpetual dedication of the waters to the lands on which they have been once applied upon payment of the annual rental charges therefor. The latter right would remain as a matter of law, even though the district had condemned appellant's property rights acquired under his grantor's contract with the Great Western Canal Construction Company. The only additional right and privilege that this contract gave the purchaser over any other water-user is that of receiving his water annually at the fixed and stipulated rental of one dollar per acre. On the contrary, a water consumer who had not purchased such a contract would be liable to pay such annual water rates as might be established from time to time in conformity with the statute. But under this contract neither the canal company nor its successors in interest could ever raise the rate as against appellant."

The court further decided in discussing the statute providing for the formation of irrigation districts, as follows:

"These provisions of the statute were evidently enacted for the very purpose of enabling the district to acquire all the water rights and privileges held and owned by individuals, companies or corporations within the territorial jurisdiction of the district. It was contemplated by the legislature that districts would be formed wherein individuals or small companies might own their own water rights and ditches for their private use, and it must have been intended that if the district desired to acquire such rights and assess the property on which such waters were being applied, it might do so by purchasing or condemning the water rights and bringing their owners into the community of interest with the other land owners in the district, and thereby place them on an equal

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footing with all others against whom assessments might be levied and collected."

Upon rehearing an entirely different phase of the case was presented to the court and it was held that the action could not be maintained, because it was in the nature of a collateral attack upon a judgment of the district court in which all of the acts done by the respondent district, including the steps taken to form such district whereby the appellant's land had been included therein, had been confirmed.

In the case at bar the respondent appeared and protested against being taken into the district and his land was excluded, which facts, as above indicated, bring the case of *Knowles v. New Sweden Irrigation District*, as decided upon the first hearing, in point.

The case of *Nampa & Meridian Irr. Dist. v. Gess*, 17 Ida. 554, 106 Pac. 994, is readily distinguished from the one at bar by the following quotation from the opinion in that case: "The only point in dispute or controversy here is the construction to be placed on this conveyance and the determination as to whether or not the 'free and perpetual use of the water for the purpose of irrigating said section of land' means that the canal shall be kept up and maintained by the grantors, and their assigns, and the water delivered to the defendant free of maintenance charge and actual cost of delivery, or whether it simply means that the defendant is the unqualified and absolute owner of a water right in the canal to the extent of the amount (conceded to be 500 inches) necessary for the irrigation of defendant's land without promise or covenant on the part of the grantor to perpetually keep the canal in repair and deliver the water to the owner of the land." In this case no such question arises, for it is expressed in the deeds here under consideration that the grantor shall keep up and maintain the system and the grantee shall pay \$12 for each cubic foot of water per second of time toward the maintenance.

Said *Nampa & Meridian Irr. Dist. v. Gess* case is of value in considering the one at bar by reason of the following observation of the court in reaching that decision, showing the

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application which the court made in that case of its decision in case of *Knowles v. New Sweden Irr. Dist.*, *supra*. "Counsel for the respondent cites the case of *Knowles v. New Sweden Irr. Dist.*, 16 Ida. 217, 101 Pac. 81, as supporting the contention that the property is bound by the contract. That case was where a ditch company had sold a water right and stipulated that the usual water rate should be the sum of \$1.00 per acre. The court held that the company and its assigns would be bound by the contract and that the canal company cannot raise the rate to the consumer. That case, however, does not touch the point here involved and the contract was specific and definite as to the annual rate to be charged."

The appellant says in his brief: "The law is well settled that the owners of water rights carried through the same ditch are legally liable to contribute *pro rata* to the maintenance thereof," and cites, among other authorities, *Shelby v. Farmers' Co-operative Ditch Co.*, 10 Ida. 723, 80 Pac. 222.

No doubt this is true in cases wherein all parties are upon equal footing and there is no contract to the contrary. In said case it appears the Farmers' Co-operative Ditch Co. was successor in interest to the Idaho Irrigation and Colonization Co., from which last-named company the plaintiff, Shelby, bought his water right. Of said plaintiff and his right the court has occasion to say: "He refused to deed his property to the corporation defendant and accept stock in lieu thereof, and it is unnecessary to say that the successor to appellant's grantor could impose no terms or conditions upon him, by any rules or regulations of the new company, that would in any manner interfere with the rights granted him in his deed."

The case of *Jackson v. Indian Creek Irr. Co.*, 16 Ida. 430, 101 Pac. 814, seems to be in point with and decisive of this case. In that case the contract relied upon provided, among other things, as follows: "The second party agrees to pay said company, its successors or assigns, on or before the first day of May, in each year, the sum of ten (10) cents per

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miner's inch for all water used, or to be used during the season, as an assessment for the management and maintenance of said canal for the ensuing year. . . ."

The trial court found that the agreement entered into between the plaintiff, Jackson, and the Orchard Irrigation Company, predecessor to the defendant, Indian Creek Irrigation Company, was void under the constitution of this state, in so far as it fixed the annual maintenance charge of ten cents per miner's inch; also that a reasonable maintenance charge for the use of said water was \$1.75 an inch.

As a conclusion of law, the trial court found that the said agreement was unconstitutional in so far as it fixed the annual maintenance charge at ten cents a miner's inch.

In passing upon this feature of the case, the supreme court said: "This contract, it would seem, very clearly fixes and defines the respective rights of the parties. By it the company sells and conveys to the plaintiff the right to receive and use water from its reservoir and canals sufficient to irrigate certain land, and the plaintiff agrees to pay therefor an annual maintenance fee of ten cents. In case of shortage for any cause, the plaintiff agrees to receive under said contract only her *pro rata* share of water, and consents that the company shall furnish only her *pro rata* share of such water. The only point urged against the validity of this contract, and the only part of such contract held to be void by the trial court is that portion which fixes the maintenance charge, and it is in the light of this provision only that this court is called upon to determine the validity of such contract. That the parties to such contract had the capacity to contract it must be conceded, and if it was in their power to contract with reference to the maintenance charge, then so far as such contract is involved in this case, it must be held valid. The argument made against that provision in the contract which fixes the maintenance charge is based upon the provision of sec. 6, art. 15, of the constitution, which reads as follows: 'The legislature shall provide by law the manner in which reasonable maximum rates may be established to be charged

for the use of water sold, rented or distributed for any useful or beneficial purpose.'

"From this it is argued that the power to fix rates by contract is taken away and such power given solely to the legislature. Conceding, then, that the premises upon which such agreement is based are correct, still we find that the legislature of this state has by enactment authorized parties to contract with reference to the rate to be charged for furnishing water for irrigation purposes. Sec. 3288 of the Rev. Codes, among other things, provides:

" 'Any person, association or corporation which may contract to deliver a certain quantity of water to any party or parties, shall deliver the same to such party or parties. . . . The amount to be paid by said party or parties for the delivery of said water, which amount may be fixed by contract, or may be as provided by law, is a first lien upon the land for the irrigation of which said water is furnished.'

"This statute clearly authorizes parties to contract with reference to delivery of water from a reservoir or canal and to fix and determine the amount to be charged as an annual maintenance fee therefor, and we believe clearly authorized the parties to make the contract involved in this case wherein or whereby a maintenance charge is fixed at ten cents per inch."

It is true the contract in case of *Jackson v. Indian Creek Irr. Co.* was entered into after the adoption of the constitution of Idaho and after the enactment of the statute quoted from by the court in that case and hereinbefore recited, and in this case the contract was entered into before the adoption of the constitution and before the enactment of the statute which seems to constitute the greatest point of difference in the two cases, which circumstance would seem to be in favor of rather than against the respondent here. In case of *Jackson v. Indian Creek Irr. Co.*, the court says:

"So, in this case, if the statute did not expressly authorize the making of such contract, still, there being no constitutional or statutory inhibition against such contracts, the parties would have a right to make the same. This necessar-

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ily leads to the inevitable conclusion that the contract involved in this case was valid and binding upon the parties thereto and their successors in interest."

In the case at bar the contracts were made before the adoption of the constitution of Idaho, and we are unable to see wherein they violate any constitutional or statutory provision, had they been made subsequent thereto. Our attention has been directed to no law of this state, and we know of none, prohibiting the owner of a water right from selling a portion of the same and by the terms of his deed obligating himself and his successors in interest to keep the system in repair for a specified sum.

It is urged that to permit such a contract to stand is to recognize a preference right in favor of the grantee as against the subsequent purchasers from the grantor, and counsel for appellant urges that "an insolvent canal owner in temporary possession of the property by a mere stroke of his pen so encumbers a canal with obligations of this character in favor of part of the water owners thereunder that the canal itself would, for all time, be not only without value, but a heavy liability in the hands of every purchaser at sheriff's sale as in this case."

Even so, this is not the only form of property which may be by an impecunious owner encumbered by contracts which depreciate the value of its title, and purchasers, whether at sheriff's sale or not, should, and generally do, take into consideration the contracts with which the property is burdened, when fixing the purchase price to be paid for whatever equity their prospective predecessors in interest own.

It must be borne in mind that in this case the appellant became the owner of the irrigating system in question long after the contracts had been entered into whereby the respondent was to enjoy the use of two cubic feet of water per second of time and was to pay \$24 per year toward the up-keep of the system. It was entirely optional with the appellant to make the purchase or not. Having elected to buy the property, it could acquire no greater interest than its vendor had and must take its title burdened with respondent's contracts. Had it

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desired so to do and had it been necessary in order to carry out the purposes of its organization, it might have acquired respondent's property right in his contracts by purchase or condemnation and have brought him into the district upon equal terms with its members, but his interest, created by these contracts, is property that may not be confiscated, or taken, without payment of just compensation. (Rev. Codes, sec. 2422.)

There was nothing in the law, prior to the adoption of the constitution of Idaho, prohibiting the predecessors of appellant and respondent from entering into the contracts whereby the grantor agreed, for a valuable and fixed consideration, to keep the irrigation system in repair, and to construe our constitution and statutes, adopted since these contracts were entered into, so as to prohibit them is not only to do violence to the English language, but also to say our state has violated sec. 10, art. 1, of the federal constitution, which provides: "No state shall . . . pass any . . . law . . . impairing the obligation of contracts. . . ."

It has been earnestly urged that the appellant is a public service corporation; that it has acquired waters of the state which have been dedicated to public use; that in the delivery and distribution of the same it acts as a common carrier in that it may be required to deliver water, when it has a surplus beyond the needs of its members, to nonmembers who need it and can use it, upon payment of a just compensation for the service, and that the contracts under consideration grant to respondent a preferential right, result in discrimination against other water-users from the system and are contrary to public policy.

To proceed upon the theory that appellant is a public service corporation in the sense that it is a common carrier, and to follow it to its logical conclusion is to contradict the theory and disprove it. If it is such a public service corporation as here contended for it must, of course, act toward all members of the public impartially, and its acts in delivering water to its members, except when it may have a surplus beyond their needs, to the exclusion of others situated similarly, except in

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the matter of membership, would be to grant to the members a preferential right which would result in discrimination against nonmembers and would be contrary to public policy.

The appellant is not a public service corporation in the sense that it is a common carrier to any other or greater extent than the term implies when applied to its own membership, and confined to the business of carrying water for the irrigation of lands within its own district. It is a mutual, co-operative corporation, organized not for profit, engaged in distributing water to its members for use upon lands within its district. (See Kinney on Irrigation and Water Rights, 2d ed., sec. 1480, and cases there cited.)

It is true, as has been suggested, that a corporation such as the appellant is may exercise the power of eminent domain, but it must be remembered that in Idaho the right to take private property for a public use, upon payment of just compensation therefor, does not, of necessity, constitute a corporation invested with that right a public service corporation in the sense that the public may exact any service from it. (*Potlatch Lumber Co. v. Peterson*, 12 Ida. 769, 118 Am. St. 233, 88 Pac. 426.)

When appellant acquired the irrigation system the right owned by respondent had already been deeded away by its predecessor in interest, so that it took said system subject to outstanding rights and burdened with outstanding obligations. It is not contended that, when made, the contracts now complained of were inequitable or granted preferential rights or discriminated against anyone then situated as was the grantee in the original contracts or deeds, from appellant's predecessor. It was optional with appellant to purchase the system with its burdens or to not purchase it. Having purchased, it was optional to acquire the rights of respondent, granted by the deeds from appellant's predecessor, by purchase or condemnation, and to take his property into the irrigation district upon the common level, or to fulfill said contracts according to their terms. Had the respondent's rights under his deeds been acquired by appellant and his property been taken into the district, the contention that no

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preferential right could be granted in his favor and against those situated similarly to him would be sound, but his rights were not acquired by appellant, his property was not taken into the district, the water-users who are members of the appellant corporation are not situated similarly to him, and the contention is not sound.

Appellant urges that neither Morrill, one of its predecessors, nor itself had notice of the claim of respondent that his expense toward the up-keep of the canal system was limited to \$12 a cubic foot of water per second of time, and particularly is that contention made against the right granted in the deed dated June 10, 1891, since Central Canal & Land Company, grantor named in said deed, had conveyed the irrigation system to Morrill prior to the date of the deed. Some objection is also made to the form of acknowledgments of the deeds from Central Canal & Land Company to respondent's predecessor, De Cloedt, and it is contended that, although placed of record, said deeds were not entitled to be recorded, and therefore did not impart constructive notice to appellant of respondent's claim.

At the trial of this case the parties stipulated, among other things: "That thereafter, by deed dated May 29, 1890, recorded in book 16 of deeds, at page 266, records of Ada county, the said Central Canal and Land Company conveyed the said canal property to one George W. Morrill, grantee.

"That said last named conveyance contained the following reservation as set forth in defendant's answer, 'save and except those certain water rights theretofore conveyed to the following persons, to wit, one water right for eighty acres of land conveyed by deed June 15, 1889, to Frank De Cloedt and recorded in book 15 of deeds, page 606, records of Ada county; also two water rights for one hundred and twenty acres of land in the aggregate conveyed by deed to S. De Cloedt, dated September 2, 1889, and recorded in book 14 of deeds, page 534, records of Ada county; also certain water right certificates now outstanding issued to C. J. Jones & Company, January 4, 1890, for 925 acres of land, that thereafter, by deed dated August 6, 1890, recorded September 9,

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1890, book 16 of deeds, at page 270, records of Ada county, the said George W. Morrill and wife conveyed the same canal property to the Boise City and Nampa Irrigation Land & Lumber Company; that said deed contained the same reservation and exceptions as to outstanding water rights as the deed from the Central Canal and Land Company to George W. Morrill."

The trial court found as a fact from the evidence, and properly so, we think, that the water right deed dated June 10, 1891, was issued to Frank De Cloedt in pursuance of the surrender and delivery, properly assigned, of a certificate or certificates equivalent to one of the water rights above mentioned, for one cubic foot of water per second of time for use upon 80 acres of land, and reserved as being outstanding and issued to C. J. Jones & Company.

The said George W. Morrill and the said Boise City and Nampa Irrigation Land & Lumber Company are among appellant's predecessors in interest and are parties through whom appellant derails title. In addition to this, at the time appellant purchased and for a long time prior thereto, respondent was in possession of his land and was using water thereon from the canal pursuant to the stipulation in his deeds. These are facts, knowledge of which ought to put a prudent man on inquiry, which would have readily disclosed the true condition of the title, and appellant is charged with notice of respondent's claim, whether his deeds were so acknowledged as to entitle them to go of record or not. (*Nielson v. Parker*, 19 Ida. 727, 115 Pac. 488; 39 Cyc. 1703.)

The judgment of the trial court was that the plaintiff (appellant) take nothing by its complaint, and that the defendant (respondent) have judgment against the plaintiff for his costs. The respondent, before the commencement of the action, tendered to the appellant and deposited into court \$120, in which sum he is indebted to appellant for the maintenance of said irrigation system for the years 1906, 1907, 1908, 1909 and 1910, being \$24 a year. The appellant is entitled to judgment against the respondent in said amount, and the respondent is entitled, under sec. 4909, Rev. Codes,

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to judgment against the appellant for his costs incurred in the district court, and judgment should have been entered accordingly. Aside from this we find no error in the record. The cause is remanded to the district court with instruction that the judgment be modified as above indicated. Costs upon appeal are awarded to the respondent.

Budge, J., concurs.

SULLIVAN, C. J., Dissenting.—I am unable to concur in the conclusion reached by my associates.

The facts as to the location of the two water rights from one or both of which the rights involved here were sold and conveyed to the grantors of the respondent, are substantially as follows:

One Morris, on August 7, 1877, filed his water right location in the recorder's office of Ada county, claiming sufficient water from Boise river to fill a ditch twelve feet wide on top from bank to bank, eight feet wide on bottom, and three feet in perpendicular depth. The location notice provides that said "water is to be used for milling, manufacturing, agriculture and for purposes of irrigating and subjecting waste and desert lands to settlement, use and cultivation," Such a ditch as therein described, with the usual fall, would perhaps carry 4,000 inches of water. The locator, Morris, died and in 1880 all of his right, title and interest to said water right and the ditches connected therewith descended to his widow and to W. H. Ridenbaugh, and it was so decreed by the probate court of Ada county. Thereafter on August 20, 1888, W. H. Ridenbaugh filed his water location notice with the recorder of said Ada county, claiming 30,000 inches of water of said river to be diverted from said river by means of a ditch thirty feet wide on bottom, fifty feet wide on top and eight feet deep, and it is stated in said notice that said water is to be used for irrigation, domestic, agricultural and mechanical purposes on the lands below the point of diversion, and it is also recited in said notice that said location of water is made as an additional one to that made by Morris on August 7, 1877.

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Here we have at least 34,000 inches of water located for the irrigation and reclamation of lands in Boise valley, to be diverted at the same point from Boise river, through one canal system, to the lands to be irrigated. Prior to the time that De Cloedt, the predecessor of the respondent, purchased the water rights consisting of one cubic foot each, involved in this case, the purchaser knew that the canal to convey such water to the lands intended to be irrigated was to be sufficiently large to convey said 34,000 inches of water to the lands intended to be irrigated. He purchased said water rights in 1889 at the time that Jones & Co., or the Central Canal & Land Co., was enlarging said canal.

It appears from the record that Frank De Cloedt and his brother were farming the land owned by the respondent in connection with other land owned by the brother at the time Jones & Co. were enlarging said canal in 1889. They sold to Jones & Co. a large amount of the products of the farm, and when they came to settle there was about sufficient due to pay for the Frank De Cloedt water rights, and that was the consideration given by Frank De Cloedt for the water rights that he afterward transferred to the respondent, the consideration for the two water rights being \$1,280, or \$640 for each water right consisting of a cubic foot of water per second of time.

Water right certificates or contracts of sale and purchase were made by the Central Canal & Land Co. with Frank De Cloedt for said two water rights, one on June 15, 1889, and two others for one-half of a water right each, on or about January 4, 1890. In said certificates the Central Canal & Land Co. agreed upon the surrender of those certificates properly assigned and indorsed to execute a good and sufficient deed in manner and form "as now adopted by said company." Thereafter on June 10, 1891, water right deeds were executed to said Frank De Cloedt by said Canal & Land Co. for the water rights represented by said certificates.

Said corporation, the Central Canal & Land Co., was organized under the laws of the territory of Wyoming, for the purpose of procuring water rights and canals for irrigating

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and reclaiming desert lands in the territory of Idaho. The water was to be sold or rented for the reclamation of such lands.

On October 1, 1888, Ridenbaugh and his associate sold and conveyed by warranty deed the water right located by said Morris and also the water right located by said Ridenbaugh consisting of about 34,000 inches; to said Central Canal & Land Co. It will thus be seen that at least the greater portion of said 34,000 inches of water was to be used in the reclamation and irrigation of land in, about and below the land of the respondent, and the construction of canals of sufficient capacity to take said water from the point of diversion to and upon the lands intended to be irrigated was commenced some time before De Cloedt purchased the water rights referred to.

Thereafter said canal company sold and conveyed to one Morrill said water rights, canals and ditches. Said Morrill thereafter conveyed said property to the Boise City & Nampa Irrigation Land & Lumber Co., a corporation organized under the laws of the territory of Idaho, for the purpose of irrigating and reclaiming desert lands and for selling, leasing and renting water rights for any and every purpose.

It appears from the record that thereafter said water rights and ditches were sold at least twice at sheriff's sale, but no question is raised on this appeal in regard to the effect of such sales.

Thereafter in 1905 the plaintiff, the Nampa & Meridian irrigation district, an irrigation district organized under the laws of the state, purchased said water rights and canals. Thus it appears from the facts of the case that said water was located and appropriated principally for sale, rental and distribution for the reclamation of desert lands.

Said deeds on their face convey to said De Cloedt said water rights for the consideration of \$1,280, which rights were intended for the reclamation of 160 acres of land, and the consideration paid therefor would average eight dollars per acre for said 160 acres of land. Said deeds contain,

among other stipulations, an executory contract, which is as follows:

“The said first party agrees on its part to keep and maintain said canal in good order and condition, and in case of accident to, or breach in, or damage to the same, to repair the injury occasioned thereby as soon as practicable and expedient.

“The second party, his heirs, executors, administrators and assigns, agree to pay said first party, its successors or assigns, on or before the first day of May in each year hereafter, the sum of twelve (12) dollars on each water right covered by and granted by this indenture and agreement, and a proportional sum on each proportional part of a water right, as assessment for the management and maintenance of said canal for the ensuing year. . . . ”

Those stipulations are no part of covenants that run with the title. The deed itself conveying the water right is an executed contract, while the stipulations above quoted have nothing whatever to do with the title conveyed and are merely an executory contract injected into the deed of conveyance.

By that executory contract the grantor agrees to keep the ditches or canals in proper condition each year, for which the grantor promises to pay twelve dollars per annum on the first day of May as his share of the “assessment for the management and maintenance of said canal for the ensuing year” for each water right. This assessment is for the management, up-keep and maintenance of the canal each year and is not a covenant that runs with the title so as to burden all of the remaining water rights and canal system with the expense of keeping the same up, provided it required more than twelve dollars per annum to maintain and keep said canals in proper repair.

Is it possible that under the law a canal owner, by a mere stroke of his pen or by entering into an executory contract, such as the one above recited, can so encumber a canal system and the water rights connected therewith with an obligation in favor of a part of the water owners thereunder, requiring other owners of water rights for all time and without com-

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pensation to maintain and keep up the canals for the benefit of those who refuse to pay their proportionate part of the maintenance charges? Can a canal owner by entering into a contract, such as the one referred to, place such a heavy liability upon the remaining part of his property? I think not, especially when the water and canal system was located and constructed for a public use. Water appropriated for distribution and sale is *ipso facto* devoted to a public use, and a canal system through which such water is conveyed is also devoted to a public use.

Under our statute, which permits the acquisition of rights by appropriation of water for sale or rental, the water so appropriated becomes perforce *publici juris*. (Sec. 372, Kinney on Water Rights, and authorities there cited.)

Since Idaho became a territory, the legislature has had the right to regulate and control the waters of the state, and as early as 1881 the territorial legislature enacted a law to regulate the right to the use of water for mining, agricultural, manufacturing and other purposes (see 11th Terr. Sess. Laws, p. 267), and the 19th section of that act is substantially the same as sec. 3189 of the Revised Statutes of 1887, which section establishes the policy of the territory in regard to water located for sale or rental for irrigation purposes, and is in part as follows:

“In case any person, company or corporation has constructed a ditch for the purpose of directing the water of any river, creek, canyon, ravine or spring for the purpose of selling the water thereof for irrigating purposes, the owners or cultivators of land along the line of, and covered by said ditch or canal, are entitled to, and have the right to the use of water from said ditch or canal for the purpose of irrigating said land so owned or cultivated, in the following order: *First*, all persons through whose land said ditch or canal runs, are entitled to the use of the water thereof in the order of their location along the line of said ditch or canal. . . . *Provided*, that the owners or cultivators of such lands pay the usual and customary rates for the use of said water.”

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And a canal owner at that time, whether a private person or a corporation, had no authority or right to grant to anyone a preferential right in regard to the maintenance and upkeep of the ditches or canals required for the distribution of such water from year to year. It is a monstrous proposition, to me, that by such an executory contract as was inserted in the deeds referred to, those who are not parties thereto should be bound or the title to other property of the obligor be affected by such a contract, or that by entering into such a contract a transient bankrupt owner of a canal and water rights, having the right to sell water rights and distribute such water, could perpetually burden a part of such public water or an interest in the canal distributing the same with a preferential right in favor of certain parties and place the great burden of maintaining such canal on others.

Here is a mere deed to a water right containing an executory contract that is not a covenant running with the title, and my associates hold that it affects other property owned by the grantor although such other property is not mentioned in the deed. Said instrument ought to be construed as an ordinary deed to realty, since water rights are declared to be real estate under our statute, and an executory contract inserted in such a deed cannot, under the law, be permitted to cast a burden upon other property or water rights of the grantor not mentioned in the deed. The deeds in question should be construed as deeds to realty and the executory contracts therein as contracts between the parties to them, and under the facts of this case and the law, they ought not to be so construed as to give a preferential right to anyone.

It is claimed that the grantor in said deeds had an absolute right to make said executory contract under the laws that existed at that time. While we might concede that the parties to those contracts could make them under the law, if they did it was a question between the grantor and the grantee, and the grantor could not cast the burden sought to be cast in this case upon subsequent purchasers of water rights in said canal. Our constitution did not change the rule of law

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in regard to granting preferential rights that already existed in this state, since preferential rights could not be granted by persons or corporations who had located and appropriated waters for sale and rental prior to the adoption of the constitution. It has been recognized ever since Idaho became a territory that the waters belong to the people, that they are *publici juris*, and could only be used for irrigation upon the terms prescribed by the legislature, and the clear policy of the law was that no preferential rights should be granted and that no discrimination should be made against the users by the canal owners.

The provisions of the state constitution in regard to water rights did not make any changes in the customs and laws that prevailed in the state at the time the constitution was adopted, but merely amplified the law as it existed in relation to water rights and the sale and distribution of water. The principles in regard thereto declared in the constitution had already been recognized by the territorial laws and the decisions of the courts to the effect that the water belonged to the public and that it could only be used for irrigation purposes upon the terms prescribed by the law and customs. As early as 1881 (Sess. Laws 1881, p. 272) the legislature provided, among other things, that the owners or cultivators of land along a canal were entitled to the use of water therefrom upon the payment of the usual or customary price therefor,—not a preferential price, but the customary price.

The water corporation that issued said certificates and deeds procured its rights for the purpose of serving the people to the extent of the water claimed by it and the capacity of its canals, under the laws of the then territory of Idaho, and it was clearly a public service corporation without any declaration of the legislature that it was so. The giving of preferential rights by public service corporations was contrary to, and in violation of, the public policy of the territory and the principles of common law. The Central Canal & Land Co. was charged with a public trust or duty, and in the absence of any specific legislation on the subject, it would, under the common law, be required to perform the service

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without giving preferential rights because of the public nature of the business, and because of the public nature of the business it is bound to serve all persons without discrimination or without giving to anyone a preferential right.

Judge Thompson, of the Central Law Journal (see 45 Law Journal, p. 278), has a well-considered article supported by numerous authorities in regard to the duties of corporations that serve the public. He there states that a great multitude of cases unite in holding that where a public corporation undertakes to perform a public service to individual members of the public, an obligation to perform is implied, whether the statutes of the state expressly require it or not. It is sufficient if such a duty clearly arises under the principles of the common law, and that such corporations are charged with what the court terms a public trust or duty, and in the absence of legislation on the subject, it would for these reasons be required under the common law to perform them. And because of the public nature of the business, it is bound to serve all persons applying for its service without discrimination. He says: "The state cannot be supposed to have granted such a franchise to enable the grantee to destroy one person and build up another."

Now, in the case at bar, the respondent, under his preferential right, is required to pay but \$24 a year for canal maintenance for 160 acres, while other land owners similarly situated and without such a preferential contract are required now to pay annually \$100 for the maintenance and up-keep of the canal, thus making a difference in favor of the respondent and others of \$76 a year. The farmer without the preferential right would need to raise on his ranch \$76 worth of products more than the one with the preferential right in order to keep even with him, provided other expenses were the same; and if the profits of the farm were very small, this difference of \$76 might make the farm of the one a losing proposition and give the other a small profit, thus destroying one person to build up another.

I do not think it can be successfully denied that the Central Land & Canal Company who undertook to give this

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preferential right was a public service corporation. It certainly was charged with public duties. Its thirty-odd thousand inches of water at the rate of one cubic foot of water per second of time to eighty acres of land would serve about 50,000 acres of land, which, if distributed among farmers at the rate of eighty acres each, would supply more than six hundred farmers. And to say that a corporation that has undertaken to supply a community of six hundred farmers (who with their families no doubt would number over 2,000 people) with water for the irrigation of their lands, is not a public service corporation, certainly is not consistent with the rules of the common law or the statutes.

Counsel for respondent state in their brief that "A canal company at a time of financial need might receive sufficient consideration for a perpetual water right so that the annual income from such water rights might thereafter be established in conformity with law." Simply because a public service corporation may at some time be in distress would not justify it in granting a preferential right forbidden by both the common law and the statutes, and contrary to public policy.

It is suggested by the majority that this preferential contract was not prohibited by statute, and is therefore a valid, binding contract, and that being true, the federal constitution prohibits states from passing laws impairing the obligation of contracts.

In my view of the matter, this preferential contract, except as to the original parties to it, is absolutely void as to all subsequent purchasers of water rights from said canal system, and therefore does not come within said provision of the federal constitution which prohibits states from passing laws impairing the obligation of contracts. The contracts there referred to are legal, binding contracts, and said provision does not apply to contracts made against public policy or to contracts that have no binding force or effect upon persons not parties thereto.

What are the facts in regard to this transaction? The respondent's grantor procured these water rights at the rate of eight dollars per acre for 160 acres. By those deeds he

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simply acquired the right to the use of the water and thereafter no charge could be made for the use of such water and no charge is sought to be made in this action for the use of such water. But the charge here sought to be made is for the annual maintenance and up-keep of the canal which is costing other users annually fifty dollars per cubic foot of water, and defendant offers to pay but twelve dollars per cubic foot.

The grantor of the defendant has paid \$1,280 for the right to the use of two cubic feet of water per second of time. The consideration paid, to wit, \$1,280, was for the use of said water and the plaintiff irrigation district is not attempting to make respondent pay for the use of the water, but only for his proportionate share or part of the annual cost of management and maintenance of said canal system. The farmers included within said irrigation district are paying for the use of the water used by them by annual assessments made against their land, the proceeds of which go to pay the bonded indebtedness of said district created by the purchase of said water rights and canal system. That is the method and manner in which they pay for their use of the water. In addition to such payments, all users are assessed annually for the management and maintenance of the canal system. When said water-users pay off said bonded indebtedness they will have paid for the use of their water. They pay for such use by annual instalments, while the respondent's grantor paid for his use of the water by making one payment of \$1,280. After each has fully paid for the use of the water, he ought to pay his proportionate part of the cost of the annual management and maintenance of said canal system without any preference whatever, at least so far as other water-users from said canal are concerned.

Said deeds to De Cloedt contain the following stipulation:

"The said second party, his heirs, executors, administrators or assigns agree to pay said party, its successors or assigns, on or before the first day of May in each year hereafter, the sum of twelve dollars on each water right covered by and granted by this indenture and agreement, as assessment for

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the management and maintenance of said canal for the ensuing year."

Could language be plainer in order to express just what said twelve dollars was agreed to be paid for annually? It is, "as assessment for the management and maintenance of said canal for the ensuing year," and not as a part of the consideration for the use of water represented by said two water rights.

The right to the use of water is one thing and a very different thing from the cost of the management and maintenance of a canal system through which to conduct such water to the place of intended use.

That stipulation to pay the twelve dollars annually for the management and maintenance of said canal system is nothing more or less than a personal contract between the canal company and De Cloedt and is entirely independent of the covenants of the deed conveying the title to the use of the water, and is only an ordinary contract of employment. It is merely an agreement by one party to perform certain labor for another *annually* each succeeding year for an agreed annual price. It in no manner affects the right or title to the use of the water and is not binding upon subsequent purchasers of water rights or the right to use water from that canal system.

In the case of *Nampa & Meridian Irr. Dist. v. Gess*, 17 Ida. 552, 106 Pac. 993, this court said:

"The company cannot, however, sell and dispose of free water rights, and thereafter claim a sufficient water rate from other consumers to pay it a profit on the free water rights thus disposed of."

This rule is also applicable to free management and maintenance, or a preferential contract therefor.

So in the case at bar, a water corporation, such as the one under consideration, cannot perpetually give to one user of water through their canal system a right to flow water for a less price annually than is required to be paid by other water-users for doing so.

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The majority opinion cites a number of decisions of this court as sustaining the conclusion reached by them, to wit: *Knowles v. New Sweden Irr. Dist.*, 16 Ida. 217, 101 Pac. 81; *Jackson v. Indian Creek etc. Irr. Co.*, 16 Ida. 430, 101 Pac. 814, and the same case on a second appeal, 18 Ida. 513, 110 Pac. 251; *Nampa & Meridian Irr. Dist. v. Gess*, 17 Ida. 552, 106 Pac. 993. However, as I view the matter, those authorities do not sustain the views expressed by the majority of the court and are not applicable to the question under consideration in the case at bar, and preferential rights for the management and maintenance of a canal system were not in issue in those cases.

In the *Knowles-New Sweden* case, Chief Justice Ailshie prepared the opinion, and in the very first paragraph he states: "This appeal involves the power and authority of an irrigation district organized under the laws of this state to levy assessments for the purposes of defraying the principal and interest on bonds issued for the purchase of an irrigation system against the lands of one who owned his own water right and privileges at the time of the organization of the district and the levying of the assessment." The main point considered in that case was the right of the district to levy an assessment for the purpose of paying the principal and interest on the bonds of said irrigation district issued for the purchase of the irrigation system against lands of one who owned his own water right. Of course, it would not be just and right to compel a person to pay for the use of water when the right to its use had been already purchased and paid for by him. In the case at bar the appellant irrigation district does not demand of the respondent that he pay the same assessment that other water-users are required to pay for the interest and bonds of said district, but it only demands that he pay his proportionate part for the maintenance and repair of the system through which his water is conducted. So that case is easily distinguished from this case. In that case *Knowles* had agreed to pay a dollar per year for the maintenance and repair of the canals and no question was raised but that that amount was amply sufficient for that purpose.

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One dollar per inch for water was all that the appellant district demanded of this respondent for the maintenance and repair of the ditch. Had he paid that sum this suit would probably never have been brought. One dollar per inch is all that is now required to be paid by any of the water-users in said district for the maintenance and repair of the canal; but whatever the charge, it must be the same to each user and no preference given. No doubt if said canal is finally required to be lined with cement its entire length of about forty-two miles, the maintenance charge per annum will be increased.

The case of *Jackson v. Indian Creek Reservoir etc. Co.*, 16 Ida. 430, 101 Pac. 814, is not in point. It appears from the record in that case that the Orchard Irrigation Company constructed the Orchard Reservoir and Irrigation system about the year 1893 or 1894 and sold to the plaintiff in that case a water right for \$1,200; that it was estimated the reservoir would hold sufficient water to irrigate 8,400 acres, and in disposing of said water rights to different parties it was intended and expected to put all on an equality in regard to the price of a perpetual water right and for the charges for maintenance and keeping the system in repair; that all of the contracts provided that ten cents per miner's inch for all water used should be paid each season for the management and maintenance of said canal; that the company sold all of said water rights at fifteen dollars per acre for a perpetual water right; that a number of the purchasers commenced the actual use of the water from said reservoir; that about 1900 or 1901 the said Orchard Irrigation Company defaulted in the payment of its taxes and also permitted a judgment to be obtained against it under which judgment the reservoir and canal system were sold at sheriff's sale, and in the default of the payment of taxes on the lands, the lands were sold for taxes; that in 1901 the Orchard company practically ceased to operate said canal; that from 1901 to 1907 the plaintiff's lands were the only lands that were irrigated from said reservoir and canals; that said reservoir only furnished about fifty or sixty inches of water; during those years the

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plaintiff kept up the ditches so far as they were kept up. The Indian Creek Irrigation Company acquired title to the reservoir in controversy and certain lands through said execution sale and the tax sales referred to, and said action was brought by said corporation for the purpose of determining plaintiff's right to the use of sixty inches of water from said canal. The main point urged against the validity of said contract was that it fixed the maintenance charge at ten cents per miner's inch, and the argument made against that provision in the contract was based upon the provisions of sec. 6, art. 15, of the constitution, which is as follows: "The legislature shall provide by law the manner in which reasonable maximum rates may be established to be charged for the use of water sold, rented or distributed for any useful or beneficial purpose." From those provisions it was argued that the power to fix the rates by contract was taken away and such power given solely to the legislature. This court there held that the legislature had by the enactment of sec. 3288, Rev. Codes, authorized the parties to contract with reference to the rate to be charged for furnishing water for irrigation purposes, and referred to the statute which provides for the fixing of rates by the county commissioners, and said:

"Whether that rate [the rate fixed by contract] can afterward be abrogated by the fixing of such rates under the statute by the board of county commissioners, we are not called upon to decide in this case, for the reason that it does not appear that such rates have ever been established by the board of county commissioners or in accordance with such statute."

The question of preferential rights was not raised in that case. Every user who had purchased water was entitled to it under the contract at the same price, to wit, ten cents per miner's inch per annum; and while the court held that that contract was valid, it did not hold nor intend to hold that preferential rights could be granted.

In the case of *Nampa & Meridian Irr. Dist. v. Gess*, 17 Ida. 552, 106 Pac. 993, it was held that the grant in a conveyance of a "free and perpetual use of water" does not obligate the

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grantor or his successors to perpetually bear and pay the expense and cost of maintaining and repairing the canal and delivering the water to the consumer, and is in line with my views as expressed in this opinion, that no preferential rights shall be granted by such a canal company.

In *Leavitt v. Lassen Irr. Co.*, 157 Cal. 82, 106 Pac. 404, 29 L. R. A., N. S., 213, it was held that a water company having water appropriated for sale, rental or distribution, the use of which is a public use, cannot confer any preferential right to one consumer over another to the use of any part of its water; and that a corporation which has appropriated water for sale, rental or distribution is simply an agent of the public for the distribution of the water to such members of the public as may apply for it and pay the legal charge for the services rendered.

In the case at bar, each of the users of water has paid for the use of their water, or are paying for it, and each ought, under the law, to be compelled to pay his proportionate share of the cost of the annual management and maintenance of the canal system.

The judgment of the district court ought to be reversed and the cause remanded for a new trial.

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(March 18, 1915.)

ESTHER A. VAN CAMP, Executrix of the Estate of
JAMES H. VAN CAMP, Deceased, et al., Respondents,
v. JOSEPH RODGERS, Appellant.

[147 Pac. 1056.]

DAMAGES—DEMURRER—CHANGE OF VENUE—ADMITTING EVIDENCE—NEW TRIAL.

1. *Held*, that the court did not err in overruling the demurrer to amended complaint, in denying defendant's motion for a change of venue, in admitting certain evidence and in overruling the defendant's motion for a new trial.

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APPEAL from the District Court of the Sixth Judicial District for Custer County. Hon. J. M. Stevens, Judge.

Action to recover damages on account of injury to crops and land by reason of defendant's depriving the plaintiffs and their predecessor in interest of certain water to which they were entitled for the irrigation of said land. Judgment for plaintiffs. *Affirmed.*

L. E. Glennon, for Appellant.

W. W. Adamson, for Respondents.

SULLIVAN, C. J.—This action was brought to recover damages alleged to have been suffered by the plaintiffs by reason of the defendant's interfering with their use of water for irrigating certain lands to which they allege they were entitled during the years 1909, 1910, 1911 and 1912. In the original complaint the damages claimed amounted to \$7,640. A demurrer to the complaint was confessed by the plaintiffs and the amended complaint was filed in which the damages claimed amounted to \$6,680. A demurrer to the amended complaint was overruled and the case was tried by the court with a jury, and resulted in a verdict and judgment for the plaintiffs in the sum of \$1,665. A motion for a new trial was denied and the appeal is from the judgment and order denying a new trial.

The appellant assigns as error the overruling of the demurrer to the amended complaint, the denying of defendant's motion for a change of venue, the admitting of certain evidence and the overruling of defendant's motion for a new trial.

Upon a careful examination of all of the errors assigned we are fully satisfied that the record contains no reversible error. The court did not err in overruling the demurrer to the amended complaint; did not err in denying the defendant's motion for a change of venue; did not err in the admission of evidence, nor in overruling defendant's motion for a new trial.

Points Decided.

We therefore conclude that the judgment must be affirmed, and it is so ordered, with costs in favor of the respondent.

Budge and Morgan, JJ., concur.

Petition for rehearing denied.

(March 19, 1915.)

DANIEL L. INGARD, Plaintiff, v. GEORGE R. BARKER,
Secretary of State, Defendant.

[147 Pac. 293.]

CREATION OF OFFICES NOT PROVIDED BY CONSTITUTION—METHOD OF FILLING OFFICES—LEGISLATIVE POWER—STATUTORY CONSTRUCTION—APPOINTMENTS TO STATE BOARD OF HORTICULTURAL INSPECTORS—POWER OF GOVERNOR TO MAKE UNDER STATUTE—CONSIDERATION OF RECOMMENDATIONS—CONDITIONAL JUDGMENT.

1. The legislature may create an office or offices not otherwise provided for, nor prohibited, by the constitution, and may fix the method of filling such office or offices; and when so created, the appointment or selection of officers to fill such offices may be made either by the chief executive, or by any person, board, corporation or association of individuals as provided by law, and such appointment would not be in conflict with the constitution or an improper exercise of power properly belonging to the executive department of the state government.

2. The framers of the constitution could not foresee what offices might be created by laws subsequently enacted, but they provided that such offices should be filled by the Governor unless the appointment or election should be otherwise provided for.

3. In passing upon the constitutionality of statutes generally, no matter from what standpoint the assault thereon may be made, nothing but a clear violation of the constitution will justify the courts in overruling the legislative will, and where there is reasonable doubt as to the constitutionality of an act, it must be resolved in favor of the act.

Points Decided.

4. In the absence of a constitutional provision to the contrary, any one of the three departments of the government may, under the authority of a statutory provision, appoint for any class of office in its department.

5. The legislative body existing by virtue of a constitutional provision has power to enact any laws that are not expressly, or by necessary implication, prohibited either by the federal constitution or the constitution of this state.

6. The power to create offices and provide the method of filling same is, unless otherwise provided for in the constitution, vested in the legislature.

7. The legislature may limit the power of the chief executive in the matter of making appointments.

8. Sec. 1310, Rev. Codes, as amended by the Session Laws of 1911, page 152, providing for the appointment of a state board of horticultural inspectors, does not vest the power of appointment in the State Horticultural Association.

9. It is beyond the authority of this court to make judicial amendments to sec. 1310, Rev. Codes, as amended by chapter 58, Sess. Laws 1911, by adding words thereto, in order to place a legal obligation upon the Governor to appoint members of the state board of horticultural inspectors recommended by the horticultural association, although the court may be of the opinion that a moral obligation rested upon the Governor to act concurrently with the State Horticultural Association in the selection of said members.

10. Where the power of appointment is clearly provided for in the act to be in the executive, and the only limitation attempted to be placed upon the power of the Governor to appoint is that, in making said appointments, he shall consider any recommendations made by the State Horticultural Association as the proper persons to be so appointed, and where the statute fails to fix the number of persons that shall be recommended, the time or place when the recommendations shall be made, the qualifications of the persons so recommended, and to provide that the Governor shall appoint said board from those so recommended, there is no legal obligation resting upon the Governor to appoint said board from the persons so recommended.

11. Statutes should be so construed as to give effect to each and every part thereof, if possible. (*People v. Hunt*, 1 Ida. 433.)

12. Sec. 1310, Rev. Codes, as amended, *supra*, requires the Governor of the state to consider any recommendations for appointment as members of the state board of horticultural inspectors made by the State Horticultural Association, and it is incumbent upon the Governor to carefully consider the person or persons so recommended

Argument for Plaintiff.

before appointing the members of the state board of horticultural inspectors, that by the joint act of the association and the Governor, the purpose and intention of the legislature might be carried out, viz., that the board be constituted of members who are learned in the science of horticulture, to the end that the horticultural interests of the state be properly protected and expanded.

13. Sec. 1310, Rev. Codes, as amended, *supra*, vests in the Governor discretionary power in appointing the members of the state board of horticultural inspectors, which he may do from the list of names recommended by the state horticultural association, but he is not confined, in making said appointments, to the names so recommended.

14. *Held*, that the state horticultural association has not had a reasonable time within which to submit recommendations to the Governor of proper persons to be appointed members of the state board of horticultural inspectors, and under the facts in this case, the State Horticultural Association is allowed sixty days from and after the handing down of this opinion in which to make such recommendations, at the expiration of which time the Secretary of State shall issue commission to any person or persons so appointed.

Original proceeding on application for writ of mandate against the Secretary of State. Writ denied, and conditional judgment ordered.

Hawley & Hawley and Henry Z. Johnson, for Plaintiff.

The Wyoming statute with reference to the duty of the Secretary of State in regard to commissions is to all intents and purposes the same as ours. (Sec. 8, chap. 95, Laws of Wyoming, 1890-91; *State ex rel. Miller v. Barber, Secy. of State*, 4 Wyo. 409, 34 Pac. 1028, 27 L. R. A. 45.)

The supreme court of Wyoming declared that the Wyoming statute was mandatory and that the Secretary of State had no right to refuse to affix the seal of the state, or countersign the commission issued by the Governor, because in the judgment of the secretary the Governor was exceeding his authority in making the appointment. (See, also, *Hill v. State*, 1 Ala. 559, 561; *State v. Harrison*, 113 Ind. 434, 3 Am. St. 663, 16 N. E. 384; *State v. Wrotnowski*, 17 La. Ann. 156, 161.)

Argument for Defendant.

Sec. 1310, Rev. Codes, as amended, does not give the power to the State Horticultural Association to name through the Governor the members of the state board of horticultural inspection. Nor does such section merely make it the duty of the Governor to consider the recommendations of said association in making appointments to membership in said board. (*In re Whitcomb's Estate*, 86 Cal. 265, 24 Pac. 1028; *In re Inman*, 8 Ida. 398, 69 Pac. 120.)

The Governor cannot be required to act simply as the mouthpiece of any board or person. (*People ex rel. Balcom v. Mosher*, 163 N. Y. 32, 79 Am. St. 552; 57 N. E. 88; *In re Kane v. Gaynor*, 144 App. Div. 196, 129 N. Y. Supp. 280, 96 N. E. 1117.)

J. H. Peterson, Atty. Genl., T. C. Coffin and E. G. Davis, Assts., for Defendant.

Sec. 6 of art 4 is the only section of the constitution which confers anything like a general appointive power upon the Governor of this state. This section has been passed upon by this court in the case of *In re Inman*, 8 Ida. 398, 69 Pac. 120, in which the court decided, in effect, that the legislature could provide by law for the appointment of officers by the Governor without the consent of the Senate. The construction of this section was also before the court in the case of *Elliott v. McCrea*, 23 Ida. 524, 130 Pac. 785.

The position taken by the court in these cases clearly established the rule, in so far as this jurisdiction is concerned, that the legislature has ample authority to prescribe just how appointments shall be made.

"The power of appointment to office is not essentially an executive function. It may therefore be regulated by law." (29 Cyc. 370; *People v. Freeman*, 80 Cal. 233, 13 Am. St. 122, 22 Pac. 173; *Fox v. McDonald*, 101 Ala. 51, 46 Am. St. 98, 13 So. 416, 21 L. R. A. 529; *State v. Hyde*, 129 Ind. 296, 28 N. E. 186, 13 L. R. A. 79; *Sturgis v. Spofford*, 45 N. Y. 446; *In re Bulger*, 45 Cal. 553.)

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The legislature may impose restrictions upon the Governor in the making of appointments. If this were not true, laws providing for civil service classifications and appointments would be unconstitutional, as would also laws attempting to create preferences in favor of honorably discharged soldiers and sailors of the Civil War in matters of appointment. Laws of both classes have been upheld as constitutional. (*People v. Bardin*, 7 N. Y. Supp. 123; *In re Sullivan*, 55 Hun, 285, 8 N. Y. Supp. 401; *In re Gaffney*, 20 N. Y. St. 165, 3 N. Y. Supp. 664; *Kip v. Buffalo*, 123 N. Y. 152, 25 N. E. 165; *People v. Saratoga Springs*, 54 Hun, 16, 7 N. Y. Supp. 125.)

In *Russell v. Lyon*, 90 S. C. 5, 72 S. E. 496, the court was construing a statute which provided that it should be the duty of the Governor to make certain appointments "upon the recommendation of the legislative delegation of G. county." The court first passed upon this statute in the case of *Elledge v. Wharton*, reported in 89 S. C. 113, 71 S. E. 657, and they decided that while officers appointed by the Governor without the recommendation provided for in the statute might be *de facto* officers, they would not be *de jure* officers.

A Secretary of State may not be required by *mandamus* to affix the great seal to and countersign an unlawful instrument issued by the Governor, or to attest his doing an unlawful act. (*People v. State Board of Canvassers*, 129 N. Y. 360, 29 N. E. 345, 14 L. R. A. 646; *People v. Forquer*, 1 Breese (Ill.), 104; *Clarke v. Trenton*, 49 N. J. L. 349, 8 Atl. 509; *State v. Dusman*, 39 N. J. L. 677; *Rose v. Knox Co. Commrs.*, 50 Me. 243.)

BUDGE, J.—On January 21st, 1915, the Honorable Moses Alexander, Governor of the state of Idaho, directed the defendant, as Secretary for the state of Idaho, to issue commissions as members of the state board of horticultural inspection to Daniel L. Ingard, Louis A. Blackman and O. G. Zuck.

The defendant complied with the said direction of the Governor in so far as the same pertained to O. G. Zuck, but declined to comply with the same in so far as it pertained to

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Daniel L. Ingard and Louis A. Blackman, alleging that as to the two latter, the attempted appointment was void and of no effect, because of being in conflict with sec. 1310 of the Revised Codes of Idaho, as amended by chapter 58 of the Session Laws of 1911, which provides: "The state board of horticultural inspectors shall consist of five (5) members, who shall be appointed by the Governor of the state, and shall hold their offices for a term of two (2) years, or until their successors are appointed and qualified; and in making said appointments, the Governor shall consider any recommendations made by the State Horticultural Association as the proper person to be so appointed."

Daniel L. Ingard, as plaintiff and petitioner, brings this as an original action in the supreme court of this state for the purpose of securing writ of mandate directing the defendant as Secretary of State, to issue to the said plaintiff a commission as member of the state board of horticultural inspection.

As suggested by able counsel, who, upon the hearing of this case in the supreme court, appeared on behalf of the honorable Secretary of State, two questions are submitted, answers to which will be decisive of this case.

"1. Is it competent for the legislature to provide that the State Horticultural Association shall have the right or authority to present or recommend to the Governor a list of names from which he must appoint the members of the state board of horticultural inspection?

"2. If the legislature has authority so to provide, has it done so by the language used in sec. 1310 of the Revised Codes of Idaho, as amended by sec. 1 of chapter 58, Laws of 1911?"

We will consider these questions in the order in which they are stated.

Sec. 1, art. 2, of the constitution, provides that "The powers of the government of this state are divided into three distinct departments; the legislative, executive, and judicial, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others,

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except as in this constitution expressly directed or permitted.”

Sec. 6 of art. 4, provides that “The Governor shall nominate and, by and with the consent of the Senate, appoint all officers whose offices are established by this constitution, or which may be created by law, and whose appointment or election is not otherwise provided for.”

Sec. 1 of art. 2, and sec. 6 of art. 4, *supra*, have been construed by the supreme court of this state in the case of *In re Inman*, 8 Ida. 398, 69 Pac. 120, and in the case of *Elliott v. McCrea*, 23 Ida. 524, 130 Pac. 785, to the effect that the legislature may create an office or offices, which may be filled by appointment either by the chief executive or by any person, board, corporation, or association of individuals, and that such appointment would not be in conflict with the constitution or an improper exercise of power properly belonging to the executive department of the state government, and as stated by this court in the case of *Elliott v. McCrea*, *supra*, the constitution itself provides the method of selection of legislative, executive and judicial officers named in the constitution.

The framers of the constitution could not foresee what offices might be created by laws subsequently enacted, and so they provided that such offices should be filled by the Governor unless the appointment or election should be otherwise provided for. The legislature, in enacting the statute in question, has exercised its constitutional right in naming and designating the officer or officers who shall make these particular appointments.

House Bill No. 92, passed by the twelfth session of the legislature and approved Feb. 21, 1913, entitled “An act to provide for the establishment of drainage districts, and the construction and maintenance of a system of drainage, . . . ” authorizing the district judge of a judicial district in which a drainage district is located to appoint the drainage commissioner for the district, was held not to be in violation of the constitutional provisions, *supra*, and was not an infringement by the judicial department of the state government upon the functions of the executive branch of the government.

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The rule would seem to be that in passing upon the constitutionality of statutes generally, no matter from what standpoint the assault thereon may be made, it is well settled that nothing but a clear violation of the constitution will justify the courts in overruling the legislative will, and where there is reasonable doubt as to the constitutionality of an act, it must be resolved in favor of the act.

Primarily the rule is well settled by numerous authorities that in the absence of a constitutional provision to the contrary, any one of the three departments of government may, under the authority of the statute, appoint for any class of office in any of the three governmental departments. (*People v. Hoffman*, 116 Ill. 587, 56 Am. Rep. 793, 5 N. E. 596, 8 N. E. 788; *Eddy v. Kincaid*, 28 Or. 537, 41 Pac. 156, 655; *State v. George*, 22 Or. 142, 29 Am. St. 586, 29 Pac. 356, 16 L. R. A. 737; *Evansville v. State*, 118 Ind. 426, 21 N. E. 267, 4 L. R. A. 93; *Davis v. State*, 68 Ala. 58, 44 Am. Rep. 128.)

A state legislative body existing by virtue of a constitutional provision has power to enact any laws that are not expressly, or by necessary implication, prohibited either by the federal constitution or by the constitution of the state. (*Lowry v. Gridley*, 30 Conn. 450; *Commonwealth v. Plaisted*, 148 Mass. 375, 12 Am. St. 566, 19 N. E. 224, 2 L. R. A. 142; *Commonwealth v. Moir*, 199 Pa. St. 534, 85 Am. St. 801, 49 Atl. 531, 53 L. R. A. 837; *State v. Cherry*, 22 Utah; 1, 60 Pac. 1103; *Kimball v. Grantsville*, 19 Utah, 368, 57 Pac. 1, 45 L. R. A. 628.)

The power to create an office, unless otherwise provided by the constitution, is vested in the legislative department of the government. The method of filling the office is to be determined by the legislature in the absence of constitutional provisions. (*United States v. Maurice*, 2 Brock. 96, 26 Fed. Cas. No. 15,747; *People v. Lindsley*, 37 Colo. 476, 86 Pac. 352; *State v. Bryan*, 50 Fla. 293, 39 So. 929.)

The power of the legislature to pass laws regulating appointments to statutory offices is absolute unless restrained by some constitutional provision. (See *State v. Covington*, 29 Ohio St. 102, and authorities there cited; *French v. State*, 141

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Ind. 618, 41 N. E. 2, 29 L. R. A. 113; *Sun Printing Assn. v. New York*, 8 App. Div. 230, 40 N. Y. Supp. 607; *Cherry v. Burns*, 124 N. C. 761, 33 S. E. 136.)

Sec. 6 of art. 4, of the constitution, provides: "The Governor shall nominate and, by and with the consent of the Senate, appoint all officers whose offices are established by this constitution, or which may be created by law, and whose appointment or election is not otherwise provided for." Under this constitutional provision, the legislature has the power to create an office and provide for the filling of the same whenever such office is not established by the constitution, and to provide for the appointment of such officer either by the chief executive or in any other manner that in the wisdom of the legislature it may deem proper, there being no inhibition in the constitution as to the creation of other offices than those named therein, but, on the contrary, there being an express recognition of such power in the following terms: "or which may be created by law, and whose appointment or election is not otherwise provided for." Many offices in this state have been created by law that were not provided for in the constitution, and in numerous instances the manner of their appointment has been clearly provided for by law. The chief executive in certain instances has been given the absolute power to nominate and appoint persons to fill certain offices created by the legislature. This, however, is not true in all cases. In some instances it requires the concurrence of certain state officials whose offices are provided for by the constitution, in order to make appointments by the Governor legal, in others the concurrence of the Senate, and in still others, the concurrence of a majority of certain boards.

That the legislature may limit the power of the chief executive in the matter of making appointments cannot be successfully refuted. (*State v. Boucher*, 3 N. D. 389, 56 N. W. 142, 21 L. R. A. 539.)

As held in the case of *In re Bulger* and *In re Merrill*, 45 Cal. 553, and *People v. Osborne*, 7 Colo. 605, 4 Pac. 1074, the legislature can abolish or change an office created by it. It may extend or abridge the terms of its incumbents at pleasure. It

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may confer the power of appointment upon any voluntary association of persons and prescribe the method of selection of said officer by such voluntary association.

In the case of *Davis v. State*, 7 Md. 151, 61 Am. Dec. 331, it was held in effect: "When the legislature creates an office by act of assembly, it can designate by whom, and in what manner the person who is to fill the office shall be appointed. . . . Where an office is of legislative creation, the legislature can modify, control or abolish it; and within these powers is embraced the right to change the mode of appointment to the office."

We have therefore reached the conclusion that sec. 1310, Rev. Codes, as amended, *supra*, is constitutional and not in violation of sec. 1, art. 2, and sec. 6, art. 4, of the constitution of this state, and that it was clearly within the power of the legislature to enact said statutory provision.

We now come to the consideration of the second proposition propounded, viz., has the legislature conferred upon the State Horticultural Association the power to nominate the state board of horticultural inspection, and is it incumbent upon the chief executive to appoint from the nominations so made? In order to dispose of this question it will be necessary to place a construction upon sec. 1310, Rev. Codes, as amended, *supra*. If this section authorizes the State Horticultural Association to appoint the state board of horticultural inspectors, or if said section gives to the State Horticultural Association exclusive power to nominate the members of said board and confers upon the Governor the power to appoint, making both acts concurrent in order that such appointments be legal, or if the provisions of said section were not fully complied with by the Governor, it was clearly the duty of the honorable Secretary of State to refuse to issue a commission to Daniel L. Ingard as directed by the Governor.

Where the chief executive is expressly authorized by law to determine when a vacancy exists in an office and has the exclusive power to fill the same by appointment, it is clearly the duty of the Secretary of State to issue the commission as directed by the Governor and impress the same with the great

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seal of the state, but where the chief executive is clothed with no such authority and the concurrent act of an authority delegated by the legislature is necessary in order to constitute a legal appointment, the honorable Secretary of State would not be justified in violating the plain provisions of the law by issuing a commission of appointment and impressing the same with the great seal of the state to any person not authorized by law to fill the same.

If we were confronted with a provision such as we find in the session laws of 1911, page 614, "An act to provide for and regulate the examination and registration of graduate nurses," to which attention is directed merely for the purpose of comparison with sec. 1310 as amended, *supra*, in which former act we find the following provisions: "Upon taking effect of this act, the Governor shall appoint, . . . a State Board of Examination and Registration of Graduate Nurses. . . . The Idaho State Association of Graduate Nurses shall nominate four (4) nurses and two (2) physicians, from which list the Governor of Idaho shall appoint an Examining Board of two (2) nurses and one (1) physician";—we would experience no serious difficulty, as said statute is clear. it is mandatory, it fixes the power of nomination and appointment and limits the chief executive to the selection made by the Idaho State Association of Graduate Nurses. It is not necessary that words be added or stricken out, or that words be given any other meaning than is ordinarily understood to be the meaning intended. But this cannot be said of sec. 1310 as amended, *supra*. It is true the language used is ambiguous in some respects; however, we think it subject to a reasonable construction when considered in its entirety. The history of the statute and the acts of prior chief executives of the state in connection therewith afford us no particular aid in placing a proper interpretation upon the provisions contained in the act, so far as it relates to the appointment of the state board of horticultural inspection. In the case of *Ada County v. Boise Com. Club*, 20 Ida. 421, 118 Pac. 1086, 38 L. R. A., N. S., 101, this court held (quoting from the syllabus): "It is an elementary principle that the

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neglect or failure of public officers to do and perform their duty as required by law will not estop the public or prevent any rights or acts of the state in enforcing such laws, and the failure of the public officials to collect a revenue license, where such is required by law, for a number of years, is not sufficient evidence of the intent of the legislature in passing such law to exclude from its operation persons and corporations from whom such officers have failed to collect such revenue license." The presumption is that the legislature understood the meaning of the words used in the act, and that these words and phrases would be interpreted according to the common usage and understanding of such words and phrases.

In the case of *Holmberg v. Jones*, 7 Ida. 752, 65 Pac. 563, the court said (quoting from the syllabus): "While courts do, in order to carry out the will of the legislature, which has been expressed in an imperfect way, interpolate punctuation, or words evidently intended to be used, into a statute, yet, when the matter to be interpolated comprises the real substance of the act, the court is not authorized to make such interpolation." It would be clearly beyond the right of this court to make judicial amendments to the statute in question by adding words thereto. In our opinion, to do so, would be an unwarranted infringement upon the powers of the legislature. It might be conceded that the court was of the opinion, after a thorough consideration of sec. 1310, Rev. Codes, as amended, that the legislature intended to place upon the Governor a moral obligation to act concurrently with the State Horticultural Association in order that the members of the board appointed be proper persons; that is, that they possess the necessary qualifications, but we would not be justified in reading into the statute a mandatory provision and thus creating a legal obligation, where none existed, upon the Governor, requiring him to appoint said board from the list of names so furnished.

The chief and main purpose of sec. 1310, Rev. Codes, as amended, *supra*, is to provide a state board of horticultural inspectors and fix the method of their appointment. The

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power of appointment is clearly fixed in the act, which is evident from the following language: "The state board of horticultural inspectors shall consist of five (5) members who shall be appointed by the Governor of the state. The act provides no other appointive power, and in express terms places the appointment with the Governor. That portion of the statute is entirely clear. The only limitation attempted to be placed upon the power of the Governor to appoint is that in making said appointments, he "shall consider any recommendations made by the State Horticultural Association as the proper persons to be so appointed." The statute fails to fix the number of persons that shall be recommended, the time or place when the recommendations shall be made, the qualifications of the persons so recommended, or that the Governor shall appoint said board from those recommended.

In the case of the *State v. Paulsen*, 21 Ida. 686, 123 Pac. 588, we find the following rule of construction: "When there is a doubt in the mind of the court in regard to the proper construction of a statute, the court may resort to the title of the act in order to construe the statute and determine the intent of the legislature. But where there is no doubt in the mind of the court, the words and phrases of a statute must be construed according to the context and the approved usage of the language, as directed by the provisions of sec. 15, Rev. Codes." We have resorted to the title of the act in order to assist us in placing a proper construction upon sec. 1310, Rev. Codes, as amended, *supra*, to aid us in determining the intent of the legislature. The title of the act, however, affords us no satisfactory solution, and we are therefore compelled to construe the words and phrases of the act as directed by the provisions of sec. 15, Rev. Codes, *supra*.

The word "recommendation" is defined in the Standard Dictionary as "The act of recommending or commending a person or thing to notice, use, confidence, or civility of another; favorable representation; that which procures a favorable reception; a note commending a person to favor." The word "consider" is defined in the Standard Dictionary as

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“To think deliberately about; reflect upon; give close attention to; ponder; as, consider the matter well before deciding. To regard in a certain aspect; to look upon; hold; estimate.” Neither of these terms, as used in sec. 1310 as amended, *supra*, can be construed to mean that any person so recommended, favorably presented; or any person considered, deliberated about, pondered over, shall be appointed a member of the state board of horticultural inspection.

In order to construe sec. 1310, Rev. Codes, as amended, *supra*, and to hold, as contended for by counsel for defendant, that the joint act of the Governor and State Horticultural Association shall be concurrent in order to authorize the appointment of members of the state board of horticultural inspection, it would be necessary for this court to read into said section a mandatory provision, such as we have heretofore called attention to as a part of a statutory provision of a similar character, found in the 1911 Session Laws, *supra*, which, in substance, would be that the Governor, in making such appointment, shall not only consider any recommendation made by the State Horticultural Association as proper persons to be so appointed, *but shall, from the list of names so recommended, appoint said state board of horticultural inspectors.*

In the case of *In re Kane v. Gaynor*, 144 App. Div. 196, 129 N. Y. Supp. 280, the court says: “While it will not be questioned that it is within the power of the legislature in creating a new state office to confer a power of appointment on some individual or association other than a public officer or body (*Sturgis v. Spofford*, 45 N. Y. 446, 450), such a course is exceptional, and nothing will be presumed in that direction. The appointment of public officials is generally looked upon as involving the executive power. It clearly contemplates a voluntary act on the part of the appointing power (*Marbury v. Madison*, 1 Cranch, 137, 155, 2 L. ed. 60), and it is impossible to dissociate the idea of discretion from the power. To appoint without discretion would be a mere ministerial act, and entirely takes away the essential element of

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an appointment, which is but a substitute for an election.

“An election contemplates a free choice of public officers, and an appointment, being a mere substitution for an election, must necessarily involve the same idea, and we are not to look to the legislature to direct anything which is inconsistent with this fundamental element of an appointment. If there is anything of the kind in the statute, it should be expressed in clear and unequivocal language. We ought not to read anything into the statute for the purpose of producing such a result.” Tried by this test, is there anything in this statute that takes away from the chief executive of the state the power to appoint the state board of horticultural inspectors, or would we be justified in reading into this statute, and at the same time giving to it a fair and reasonable construction, that the appointment of the state board of horticultural inspection depends upon the concurrent act of the State Horticultural Association and the Governor of the state? Does the act, when considered in its entirety, confer upon the State Horticultural Association the power to nominate and impose upon the chief executive the duty of selecting, as members of the state board of horticultural inspection, persons so nominated and none other? We think not. The language of the section is consistent with the recommendation for appointment by the State Horticultural Association, but wholly inconsistent in so far as it makes of the Governor the mere ministerial officer of the State Horticultural Association.

In the case of *People v. Hunt*, 1 Ida. 433, the court held (quoting from the syllabus): “Statutes should be so construed as to give effect to each and every part thereof, if it is possible to do so.” We think that a proper construction can be given to sec. 1310, Rev. Codes, as amended, *supra*, and effect given to each and every provision thereof. The statute clearly imposes two duties upon the chief executive—first, to appoint a state board of horticultural inspectors; second, to consider any recommendations made by the State Horticultural Association as the proper persons to be so appointed. There rests upon the horticultural association the voluntary

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duty to make recommendations to the Governor of persons, who, in its judgment, are proper persons to be appointed members of said state board of horticultural inspectors. The act, neither in direct terms nor by implication, requires the Governor to appoint said board from the recommendations so made, but it does impose upon him the duty of considering any recommendations made by the State Horticultural Association, and from a reasonable construction of the statute, it is incumbent upon the Governor, not only to consider any recommendations that are made of persons recommended to be appointed by the horticultural association, but to carefully consider such person or persons so recommended before appointing the members of said board. Said association would not be limited to but one recommendation, or recommendations made at one time, but should be allowed to make any number of recommendations of proper persons to be appointed, within a reasonable time, that the evident intention of the legislature might be carried out by the joint act of the association and the Governor, and that the board would be made up of members who are learned in the science of horticulture, to the end that the horticultural interests of the state be properly protected and expanded. In our opinion, as appears from the record, the chief executive has not fully complied with sec. 1310, Rev. Codes, as amended, *supra*, in this respect. The state horticultural association should be fairly dealt with in the selection of the state board of horticultural inspectors. That association is vitally interested in the personnel of this board and has a right to be considered.

In our judgment, the writ of mandate should not issue at this time, upon the ground and for the reason that the State Horticultural Association has not had an opportunity, as contemplated under said sec. 1310, Rev. Codes, as amended, *supra*, to make recommendations of proper persons to be so appointed. This being an original proceeding in this court and the facts are undisputed, what would be a reasonable time within which to allow the state horticultural association to make recommendations is a question of law and eminently proper for this court to decide. We have reached the conclu-

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sion that the state horticultural association shall be allowed sixty days from and after the handing down of this opinion in which to make any recommendations as to the proper persons to be so appointed, from which said names so recommended the Governor may appoint members of the state board of horticultural inspectors, but he is not confined, in making said appointments, to the names so recommended. At the expiration of sixty days, the Secretary of State shall issue a commission to any person or persons appointed by the Governor members of said state board of horticultural inspectors.

Morgan, J., concurs.

SULLIVAN, C. J., Concurring in Part and Dissenting in Part.—(1) I am unable to concur in the final conclusion reached by the majority of the court. I do concur, however, in the conclusion that the legislature may create an office not provided for by the constitution, and may provide for the filling of the same by appointment to be made by some person or persons other than the Governor. That is, the Governor has not the constitutional power or authority to make appointments to an office created by the legislature where the legislature has otherwise provided for such appointments.

(2) I also concur in the conclusion reached that the Secretary of State may refuse to issue a commission of appointment to certain persons appointed to office by the Governor.

(3) I cannot concur in the construction placed upon sec. 1310, Rev. Codes, as amended by Laws of 1909, p. 322, and Laws of 1911, p. 151. As I view it, the legislature has the power to authorize the appointment of the members of a board by the Governor in connection with others, and not leave the appointment entirely in the hands of the governor. That was clearly the intent and purpose of the legislature in providing for the appointment of members of the board of horticultural inspection.

That part of said sec. 310 applicable to this question is as follows:

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“The state board of horticultural inspection shall consist of five (5) members; who shall be appointed by the Governor of the state, and shall hold their office for a term of two (2) years or until their successors are appointed and qualified and in making said appointments the Governor shall consider the recommendations of the ‘State Horticultural Association’ as the proper persons to be so appointed.”

The legislative intent was to make said board as effective as possible in performing the duties imposed upon it and remove it as far as possible from politics and the mutative whims of the Governor. To me that intent is clearly shown by the language used in that part of the section above quoted, and that language has been so construed by former Governors and the appointment of the members of said board made from those recommended by the State Horticultural Association “as the proper persons to be so appointed,” ever since the passage of the first horticultural act in 1897 (Sess. Laws, p. 109). As I understand it, history shows that no Governor has refused to appoint the members of such board from those recommended by the association until the present Governor refused to do so.

Said horticultural act has been amended and changed a number of times since its first enactment. In 1899 (Sess. Laws, p. 122) said law was re-enacted without any amendments whatever. It was re-enacted with some amendments in 1903 (Sess. Laws 1903, p. 347), and the first section of that act contains, among other things, the following provision, which is substantially the same as the provision above quoted: “And in making said appointments, the Governor shall consider the recommendations of the State Horticultural Society as to the proper persons to appoint.” The two *ex-officio* members of the board provided for were here changed and said two members were in the act of 1903 fixed as the Director of the Experiment Station and the Professor of Zoology of the University of Idaho. This, however, makes no change in the manner or method of appointing the three members of said board who were to be appointed.

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In 1907, the legislature amended said act to some extent (Sess. Laws 1907, p. 448), and sec. 1 of the former acts was so amended that the three appointive members of the board should be appointed by the Governor, and failed to provide that said members should be appointed on the recommendation of the State Horticultural Society or Association.

The code commissioner, in preparing the Revised Codes of 1909, copied therein as sec. 1310 the provisions of the horticultural act as passed by the legislature in 1907. Those codes were adopted early in the session of 1909 and later in that session the legislature again revised the horticultural inspection act by amending sec. 1310 as it appeared in the new codes. That amendatory act is found at page 322, Sess. Laws 1909. The act of 1909 amending sec. 1310 leaves that part of said section involved in this controversy as above quoted. It does away with the *ex-officio* members of said board and provides for the appointment of the five members thereof, and also provides that "in making such appointments, the Governor shall consider the recommendations of the State Horticultural Association as the proper persons to be so appointed."

It will thus be observed that in the amendment of 1907, the words of limitation upon the appointive power of the Governor were omitted entirely and were inserted and slightly modified in the amendment of 1909, as above indicated, and restored in exactly the same language and words in which the provision first appeared in the act of 1897, except that in the amendment of 1909 the word "association" is used instead of the word "society." Under the act of 1909, for the first time in the history of the horticultural statute the entire membership of the board was made appointive. After the statute of 1907 had repealed all limitation imposed on the Governor in appointing said members, the amendment of 1909 placed the same restrictions upon him in making such appointments as were placed upon the Governor by the first horticultural act passed by the legislature of the state in 1897.

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In 1911 (Sess. Laws, p. 152) said section 1310 was amended, but the sentence before us for construction was not changed in any manner.

The fact that said provision was entirely left out of the amendment of 1907, leaving the Governor to appoint without requiring him to appoint from recommendations made by the horticultural association, and then in the amendment of 1909 and 1911 said provision was included, requiring that the Governor shall consider any persons recommended by the State Horticultural Association as proper persons to be appointed on said board, is significant, to say the least, and clearly indicates to my mind that the legislative intent was to require the Governor to make such appointments from those recommended by the horticultural association, provided it made such recommendations.

It is clear to me from the purview, object and purpose of said act that the legislature considered that there was great danger to the horticultural interests of the state from the very things and diseases there sought to be checked and stamped out. The eighteenth section of said act contains the following: "Whereas there is great danger to the horticultural interests of the state of Idaho from pests and other causes for which no adequate remedy has been provided," and it is those pests and other causes that the legislature sought to have destroyed by the enactment of said law and it did not intend that appointments to said board of horticultural inspection should be made by the Governor for political or for any other purpose than that which was clearly intended by the provisions of said act. It was intended to put a check upon the Governor in that regard by requiring him to make such appointments from persons selected by the horticultural association, which association was presumed to have the horticultural interests of the state within its knowledge and comprehension more than any other men or body of men.

It is also clear to me from the provisions of said act that the legislature did not intend to place the appointment of the members of said board with the State Horticultural Association and make it their duty to *appoint*, said associa-

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tion being a voluntary association of unofficial persons; but did intend to authorize said association to submit a list of names to the Governor for these appointments, should it desire to do so, which has been done since the enactment of said law. Such list of names might be equal to, greater, or even smaller, than the number of places to be filled, but if the association desired, as has been its custom, to submit a list of names of a much greater number than the number required to be appointed, as in the case at bar, where they submitted nine names where only three were to be selected, they were authorized to do so. The legislature did not desire to say that the Governor *must* make appointments from a list submitted, for the association might neglect to provide such list, and in that case the Governor was left free to make the necessary appointments without the recommendations which might not be forthcoming and which it would be difficult, if not impossible, to compel. That is, it was not intended that the association should defeat such appointments by a failure to furnish a list of names. The legislature evidently intended to leave the matter open to the Governor to make such appointments as he might desire to make in case no recommendations were made by said association.

Recurring to the language used in said sec. 1310, I think it fully justifies the conclusion just suggested; it is that "in making said appointments the Governor *shall* consider any recommendations made by the State Horticultural Association as to the proper person[s] to be so appointed."

This construction of that statute gives force and effect to the evident intent of the legislature, and is in harmony with every known rule of statutory construction applicable thereto, and would not in any manner infringe any provision of the constitution. Any other construction would render useless and meaningless the words of the statute which provide that the "Governor shall consider any recommendations made by the State Horticultural Association as the proper persons to be so appointed."

Under our form of government such associations and private persons have the right and privilege to recommend per-

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sons for appointment to appointive positions without legislative authority so to do, and the appointive power is supposed to consider such recommendations. If the language quoted from said section means nothing and gives no right but that which the association already had, it certainly was a work of supererogation on the part of the legislature and adds nothing to the act. But in my view of the matter, the legislature intended something by said provision more than an attempt to confer on the horticultural association a right which it already had. The legislature provided that the Governor "shall" consider the persons so recommended by the association "as the proper persons to be appointed" to such office, and it is his bounden duty to appoint the members of said board from a list of persons recommended by such association, provided it makes recommendations. It is not to be presumed that such recommendations would not be made, as they have been so made since the passage of the first horticultural act in 1897.

If the members of this board are to be appointed because of their partisan politics and in order to reward partisan workers by the Governor, the efficiency of said department will no doubt be greatly impaired. It is clear that the legislature recognized this and intended to require the Governor to appoint the members of said board from those recommended by the State Horticultural Association and thus make effective the provisions of said act in promoting the very best interests of the fruit industry of the state in appointing competent men possessed of proper horticultural knowledge and experience. I think history shows that no Governor prior to the present one has ever ignored the recommendations of the State Horticultural Association in making such appointments, and it is the duty of this court to construe said act in accordance with the intent of the legislature, since the intent of the statute is the law, and the statute ought to be construed in accordance with such intent.

(4) The opinion of the majority concludes that although the State Horticultural Association has recommended nine

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persons to the Governor for appointment to positions on said board, such association has not had a reasonable time to make such recommendations, and that the question of reasonable time is a question of law, and holds that the horticultural association shall have sixty days in which to make other recommendations, and in case the Governor refuses to appoint any persons recommended by such association, although they might recommend a thousand or more, the Governor may then appoint whom he pleases. Under that conclusion it would not surprise me in the least if the Governor should refuse to appoint every man recommended by the association, unless it should recommend the two men he has already attempted to appoint to that position, or others who would agree with the Governor that they would vote or support for the office of state horticultural inspector the person whom the Governor would suggest, since he has already attempted to appoint the plaintiff Ingard, and one Blackman, who have not been recommended by said association. Evidently the Governor not only intends to appoint the board, but intends to compel the board to permit him to appoint the state horticultural inspector, which officer, under the law, should be appointed by said board and not by the Governor.

The majority concludes that the writ of mandate ought not to issue for sixty days. I concur with them so far as the sixty days is concerned, but in my view of the matter the writ should not issue at all. The majority opinion holds that it is beyond the authority of this court to make judicial amendments to said sec. 1310. I concur in that view of the matter, but the difficulty is, the majority opinion, as I understand it, proceeds to amend said section by adding something thereto that is not contained in the section, and fails to construe said section in accordance with the clear intent of the legislature. The Governor not only violates the clear intent of the act by refusing to appoint those recommended, but violates another intent; namely, that of taking said appointments out of partisan politics, and proceeds to appoint three of his partisans, two of whom were not recommended by said association.

The writ should be denied.

(March 19, 1915.)

STATE, Respondent, v. JOHN JEWETT, GEORGE W. WALTON and A. G. PRESTON, Appellants.

[147 Pac. 288.]

APPEAL—MOTION TO DISMISS—FAILURE TO SERVE AND FILE TRANSCRIPT IN TIME—RULES OF COURT.

1. The rules of practice in this court provide that within sixty days after an appeal is perfected the transcript of the record must be filed in this court, and that written evidence of the service thereon upon the adverse party shall be filed therewith; also, that if the said transcript is not filed within the time prescribed, the appeal may be dismissed on motion, without notice.

APPEAL from the District Court of the Fifth Judicial District, in and for the County of Bear Lake. Hon. Alfred Budge, Judge.

Action to recover the penalty of bail bond. Judgment for plaintiff. Appeal *dismissed*.

John A. Bagley and Chas. E. Harris, for Appellants, cite no authorities on point decided.

J. H. Peterson, Atty. Genl., J. J. Guheen, T. C. Coffin, E. G. Davis, Assts., and Jesse P. Rich, County Atty., for Respondent.

In view of the obvious lack of merit of appellants' defense and their reliance entirely upon technical matters, we have felt justified in asking that the appeal be dismissed under rule 23, which provides that the transcript on appeal must be filed within sixty days after the perfection of the appeal, while in this case 131 days elapsed. (*First Nat. Bank v. Shaw*, 24 Ida. 134, 132 Pac. 802.)

MORGAN, J.—This is an appeal from an order denying a motion for a new trial in a case wherein judgment was ob-

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tained against appellants and in favor of the state for the sum of \$1850 claimed to be due by reason of the forfeiture of a bail bond.

The respondent moved to dismiss the appeal upon the ground that appellants have failed to comply with rule 23 of this court, in that they failed to serve upon the respondent, or file in this court, the transcript of the record within sixty days after the appeal was perfected.

Judgment was filed in this case in the district court on February 17, 1913. A motion to vacate and set aside the judgment and for a new trial of the action was filed on February 26, 1913. Said motion was, by the district court, overruled and denied on October 23, 1913. Notice of appeal to this court from the order denying appellants' said motion for a new trial was filed with the clerk of the district court on November 11, 1913, and on November 17th of said year an undertaking upon appeal was also filed. The transcript on file in the office of the clerk of this court fails to disclose any proof of service thereof upon the respondent, but it is stated in respondent's brief that "on May 31, 1914, the attorney for the appellants forwarded to the attorney general's office a copy of the transcript on appeal, lacking in many important particulars, such as a certificate of authenticity, but of which errors the respondent has taken no advantage. The fact that no bill of exceptions was ever settled, no certificate ever signed by the judge as to the papers used by him upon the hearing of a motion for a new trial, and the fact that six days elapsed between the filing of the notice of appeal and the filing of the undertaking on appeal have been disregarded by the respondent, and if error justifying a dismissal of appeal in any of these matters has been committed by the appellants, the state has taken no advantage thereof."

It is apparent from an examination of the transcript in this case that the above-mentioned errors and omissions actually do exist. However, since the attorney general has seen fit to rely alone for a dismissal of the appeal upon the failure

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of appellants to conform to said rule 23, the motion will be disposed of upon that ground alone.

As heretofore indicated, the notice of appeal was filed November 11, 1913, and the undertaking on appeal was filed on the 17th of that month. The transcript on appeal was filed in this court on March 4, 1914, and the motion to dismiss the appeal for failure to file and serve said transcript in time was filed on May 21, 1914. Thereafter, as appears by an admission in respondent's brief, the appellants served upon respondent a copy of the transcript on appeal on May 31, 1914, but neither the date nor the fact of service appears otherwise than by such admission. It will be observed that said transcript was neither served upon the adverse party nor filed in this court within sixty days after the appeal was perfected.

Rule 23 of the rules of practice in this court is as follows:

"Filing and Serving of Transcript.—In all cases where an appeal is perfected, or a writ of error issued, transcripts of the record (showing the date of filing the undertaking on appeal) must be served upon the adverse party and filed in this court within sixty days after the appeal is perfected or writ of error issued, and the same must be certified to be correct by the attorneys of the respective parties or by the clerk of the court from which the appeal is taken. Written evidence of the service of the transcript upon the adverse party shall be filed therewith."

Rule 25 provides that the time limited within which a transcript must be served and filed, as set forth in rule 23, may be extended by an order of the court, or a justice thereof, upon good cause shown by affidavit, or by stipulation of the parties filed with the clerk, but it does not appear that any such extension of time has been granted or applied for, or that any such stipulation has been entered into.

Rule 26 provides that if the transcript of the record is not filed within the time prescribed by rule 23, the appeal may be dismissed on motion, without notice.

Points Decided.

These rules have been construed by this court in a number of cases. (See *First National Bank of American Falls v. Shaw*, 24 Ida. 134, 132 Pac. 802, and cases therein cited.)

The motion to dismiss the appeal is granted. Costs on appeal awarded to respondent.

Sullivan, C. J., concurs.

Budge, J., did not sit at the hearing nor take part in the decision of this case.

(March 19, 1915.)

JAMES CHAPMAN, Appellant, v. HERMAN BOEHM,
W. B. McCARTNEY and S. THOMPSON, Respondents.

[147 Pac. 289.]

APPEAL—TIME FOR TAKING—MANNER OF TAKING—SERVICE OF NOTICE—
DISMISSAL.

1. Sec. 4807, Rev. Codes, as amended by chapter 111, Session Laws 1911, page 367, limits the time within which an appeal may be taken to the supreme court from a judgment rendered in a district court or an appeal from an inferior court to sixty days from the entry of judgment, and this court is without power to enlarge the time so fixed.

2. Sec. 4808, Rev. Codes, provides the manner of taking an appeal and that service of notice thereof must be made on the adverse party or his attorney. Said section requires such notice to be served upon each party whose interest would be affected by modification or reversal of the judgment, and it must appear from the transcript that such notice has been so served or the appeal will be dismissed upon motion.

APPEAL from the District Court of the Sixth Judicial District for Bingham County. Hon. J. M. Stevens, Judge.

Opinion of the Court—Morgan, J.

Action for damages. Judgment for defendants. Appeal *dismissed*.

A. S. Dickinson, for Appellant, cites no authorities on points decided.

J. W. Jones on motion to dismiss appeal.

This judgment was rendered on an appeal from the probate court of Bingham county, and this appeal was not taken within 60 days after the entry of said judgment, and motion to dismiss the appeal should be sustained. (*Grisinger v. Hubbard*, 21 Ida. 469, Ann. Cas. 1913E, 87, 122 Pac. 853; *McElroy v. Whitney*, 24 Ida. 210, 133 Pac. 118.)

MORGAN, J.—This action originated in the probate court of Bingham county, where it was originally tried, and from which court an appeal was taken to the district court of the sixth judicial district in and for the county of Bingham.

The trial resulted in a verdict and judgment in favor of all the defendants, which judgment was entered on November 18, 1913. On March 13, 1914, notice of appeal from said judgment was served upon John W. Jones, attorney for two of the defendants, and filed. It appears that when the clerk of the district court made his certificate as to the contents of the transcript he failed to certify that an undertaking on appeal to this court had been filed. Appellant has moved that a corrected certificate, by the said clerk, showing the filing of said undertaking, be substituted for that appearing in the record, which motion has been granted and said corrected certificate shows, among other things, that the appeal was taken on March 13, 1914, and that a good and sufficient undertaking on appeal was duly filed on March 14, 1913.

The respondents McCartney and Thompson have moved that the said appeal from the judgment be dismissed, for the reason that the same was not taken until more than sixty days had elapsed after the entry of said judgment.

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The law fixing the time within which appeals may be taken from a district court to the supreme court in cases of this kind is to be found in sec. 4807, Rev. Codes, as amended by chap. 111 of the Session Laws of 1911, page 367, and the part thereof necessary to a decision upon said motion is as follows: "An appeal may be taken to the supreme court from a district court: 1. From a final judgment in an action or special proceeding commenced in the court in which the same is rendered; from a judgment rendered on an appeal from an inferior court; from a judgment rendered on an appeal from an order, decision or action of a board of county commissioners; within sixty (60) days after the entry of such judgment."

It will be observed that nearly four months expired between the entry of the judgment and the attempted appeal therefrom in this case. The statute limits the time within which such an appeal may be taken to sixty days from the date of entry of judgment, and this court is without power to enlarge the time so fixed.

On February 5, 1914, a motion was made in the district court to set aside and vacate the verdict and judgment and for a new trial of the action, which motion was, on March 12, 1914, overruled. The appeal above mentioned, notice of which was filed on March 14, 1914, is also taken from the order denying and overruling said motion.

The said respondents McCartney and Thompson have moved in this court that the appeal from the order denying the motion for a new trial be dismissed. Said motion is based upon the ground, among others, that while there were three defendants in said action, one of whom was represented by one attorney and the other two by another, service of notice of the motion for a new trial, service of notice of appeal, service of the reporter's transcript and service of transcript on appeal were made only upon John W. Jones, Esq., attorney for the respondents McCartney and Thompson, and no service of said papers, or any of them, was ever made upon respondent Boehm, or upon his attorney, Karl S. Fackrell,

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Esq. The record fails to disclose upon whom the reporter's transcript or the transcript upon appeal were served. Rule 23 (96 Pac. x) of the rules of practice of this court is, in part, as follows:

"Written evidence of the service of the transcript upon the adverse party shall be filed therewith."

Upon the copy of the notice of motion for a new trial contained in the transcript appears the following notation: "Service by copy duly accepted by counsel for defendants," and upon the copy of the motion for a new trial contained in the transcript appears the following notation: "Service admitted by counsel for defendants." These notations are neither dated nor signed. The copy of the notice of appeal contained in the transcript bears the following indorsement: "Service duly admitted by counsel for defendants. 3/13/14. (Signed) John W. Jones, Atty. for McCartney & Thomas." There is no evidence of service upon either the respondent Boehm or his attorney, and the record discloses that said Boehm was a defendant in said case whose interest would be affected by modification or reversal of the judgment.

The statutory requirement for service of the notice of appeal is to be found in sec. 4808, Rev. Codes, and is, in part, as follows:

"An appeal is taken by filing with the clerk of the court in which the judgment or order appealed from is entered, a notice stating the appeal from the same, or some specific part thereof, and serving a similar notice on the adverse party, or his attorney. . . . "

Said section has frequently been interpreted by this court and has been held to require notice of appeal to be served upon each party whose interest would be affected by modification or reversal of the judgment appealed from, whether such party be plaintiff, defendant or intervenor. (*Jones v. Quantrell*, 2 Ida. 153, 9 Pac. 418; *Coffin v. Edgington*, 2 Ida. 627, 23 Pac. 80; *Lydon v. Godard*, 5 Ida. 607, 51 Pac. 459; *Lewiston Nat. Bank v. Tefft*, 6 Ida. 104, 53 Pac. 271; *Titiman v. Alamance Min. Co.*, 9 Ida. 240, 74 Pac. 529; *Baker v. Drews*, 9 Ida. 276, 74 Pac. 1130; *Diamond Bank v. Van Meter*, 18

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Ida. 243, 21 Ann. Cas. 1273, 108 Pac. 1042; *Berlin Machine Works v. Bradford-Kennedy Co.*, 21 Ida. 669, 123 Pac. 637.)

It must affirmatively appear from the transcript that the notice of appeal has been served as required by said sec. 4808, or the appeal will be dismissed upon motion. (*Ander-son v. Knott*, 1 Ida. 626; *Tootle v. French*, 3 Ida. 1, 25 Pac. 1091; *Adams v. McPherson*, 3 Ida. 718, 34 Pac. 1095.)

For the foregoing reasons the motions to dismiss said ap-
peal will be granted.

In view of the foregoing conclusions reached by the court, a discussion of the other points raised by said respondents is not deemed to be necessary. Costs are awarded to the re-
spondents McCartney and Thompson.

Sullivan, C. J., and Budge, J., concur.

(March 22, 1915.)

JOSEPH FARNSWORTH, Respondent, v. I. W. PEPPER,
Appellant.

[148 Pac. 48.]

SALE OF REAL ESTATE—VENDOR'S LIEN—FINDING OF FACTS—SUFFI-
CIENCY OF EVIDENCE—CONSTRUCTION OF STATUTE.

1. *Held*, that the evidence is sufficient to support the finding of facts.

2. Where one owns real estate, the legal title to which stands in the name of another, and he contracts to sell the same to a third party and arranges with the one who holds the legal title and the purchaser that the former shall convey the title to said real estate directly to the purchaser, the vendor of such real estate has a vendor's lien on such real estate for the purchase price thereof.

3. Under the provisions of sec. 3441, Rev. Codes, one who sells real estate has a vendor's lien thereon independent of possession for so much of the purchase price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer.

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APPEAL from the District Court of the Fourth Judicial District for Cassia County. Hon. Edward A. Walters, Judge.

Action to foreclose a vendor's lien on real estate. Judgment for the plaintiff. *Affirmed.*

B. J. Briggs and S. T. Lowe, for Appellant.

In order for the plaintiff to maintain an action to foreclose a vendor's lien he must prove that he sold and conveyed the land on which he claims his lien. (Sec. 3441, Rev. Codes; *Kelly v. Ruble*, 11 Or. 75, 4 Pac. 593.)

The purchaser of land will not be compelled to take or pay for a doubtful title. (*Benson v. Shotwell*, 87 Cal. 49, 25 Pac. 249; *Brown v. Widen* (Iowa), 103 N. W. 158.)

The defendant is not holding the premises under or by virtue of the plaintiff, but acquired title to the same while he was not in possession thereof, but after he had been ejected therefrom; therefore, the title procured from Benjamin Farnsworth did not inure to the benefit of the plaintiff, the defendant is not estopped to dispute the title of the plaintiff, and the rule requiring the surrender of possession before the rescission and cancellation of the notes has no application in this cause. (39 Cyc. 1618; *Oregon Short Line R. Co. v. Quigley*, 10 Ida. 770, 80 Pac. 401.)

Robert S. Meyer, Holden & Holden and K. I. Perky, for Respondent, cite no authorities on points decided.

SULLIVAN, C. J.—This action was brought to enforce an alleged vendor's lien upon certain real estate situated in Cassia county, near Burley, Idaho. The action was tried by the court without a jury and finding of facts and conclusions of law were made by the trial court and judgment entered in favor of the plaintiff decreeing a vendor's lien upon the premises involved. The appeal is from the judgment.

Numerous errors are assigned and reversal of the judgment demanded.

The following facts appear from the record:

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The plaintiff and defendant on or about August 18, 1910, entered into a written contract for the sale and purchase of a 40-acre tract of land in Cassia county, for the purchase price of \$2,650. In said written contract the receipt of one dollar thereof is acknowledged and two promissory notes were executed by the appellant, one for \$1,000 and one for \$1,650, for the balance of the purchase price. This contract was entered into on or about August 18, 1910. Said land had been entered as a homestead by Benjamin Farnsworth, the brother of respondent. At the time said contract was entered into final proof had not been made at the United States Land Office for said land, but was made on November 4, 1910. At the time said contract was entered into, the respondent did not have the title to said land, but he put the appellant in possession thereof and the appellant had the crop then growing on the land, harvested it, sold it and received the proceeds thereof.

The record shows that there had been some arrangement between respondent and his brother who entered said land, that the respondent should have the 40-acre tract of said land involved in this controversy for certain advances that he had made to his brother, Benjamin Farnsworth, and that the appellant desired to and did purchase the other 40 acres of said homestead entry and entered into a contract with Benjamin Farnsworth for its purchase, and it was then arranged between the appellant, Pepper, and Farnsworth that Benjamin Farnsworth should convey said entire 80 acres to him under such purchases and avoid the necessity of Benjamin Farnsworth's conveying to Joseph Farnsworth one forty of said tract and Joseph Farnsworth's then conveying the same to Pepper, and a written contract was entered into on November 4, 1910, for that purpose.

The consideration named in said written contract of November 4th was \$4,000, and thereafter on November 15, 1910, Benjamin Farnsworth and his wife conveyed said 80-acre tract to Pepper for a consideration named in the deed of \$7,000. Appellant contends that he bought the entire 80-acre tract of Benjamin Farnsworth and the evidence is conflicting

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upon this point. The court, however, found, and we think the evidence amply sustains the finding, that he purchased only one forty of said 80-acre tract from Benjamin Farnsworth and purchased the other 40 acres from Joseph Farnsworth.

The court finds that said conveyance from Benjamin Farnsworth to Pepper conveying said 80-acre tract, which includes the 40-acre tract sold by Joseph Farnsworth to Pepper, was made in pursuance of an agreement and arrangement between Pepper and Joseph Farnsworth and Benjamin Farnsworth, and the evidence amply supports that finding.

On November 30, 1910, the appellant wrote a letter to an attorney in Idaho Falls, in which he explained to the attorney that he had bought one-half of said homestead from Benjamin Farnsworth and the other half from the respondent. On December 2, 1910, the appellant signed a written acknowledgment and release in which the said contract of August 18, 1910, made between Joseph Farnsworth and the appellant for the purchase of Joseph Farnsworth's 40-acre tract is referred to, in which it is stated as follows:

"Now, therefore, I do hereby acknowledge that the said Jos. Farnsworth has performed all requirements that were called for in said contract, except that the final certificate of B. W. Farnsworth does not properly describe the land to have been deeded, and is not yet of record, and I herewith release him from any liability under said contract, except for above notation."

It is true that appellant claims that said release was obtained through misrepresentation or fraud, but the evidence does not support that contention. Taking all of the evidence, it clearly establishes the fact or facts that the appellant had purchased 40 acres of said land from respondent and 40 acres of Benjamin Farnsworth. At the time he purchased the 40 acres from respondent, he executed and delivered to this respondent his two promissory notes, as above stated, and did not demand that they be returned to him at the time he entered into the contract or arrangement for Benjamin Farnsworth to convey said entire 80-acre tract to him, and

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made a written acknowledgment some weeks after receiving said deed from Benjamin Farnsworth that Joseph Farnsworth had fully kept his contract with him in regard to the sale of said 40 acres of land, and stated in his letter, above referred to, that he had purchased one forty of said tract from Benjamin Farnsworth and the other from respondent.

The evidence amply sustains the findings of the trial court.

Counsel for appellant contends that under the provisions of sec. 3441, Rev. Codes, in order for plaintiff to maintain this action to foreclose a vendor's lien, he must prove that he sold and conveyed the land on which he claims his lien, and contends that the record shows that the respondent never held the title to said land and did not convey it to the appellant.

Said section is as follows: "One who sells real property has a vendor's lien thereon, independent of possession, for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer."

That section simply provides that one who sells real property has a vendor's lien. The evidence shows that the respondent was the equitable owner of said land and sold it to the appellant, and it was agreed among them that the legal title should go directly from Benjamin Farnsworth to Pepper. That was sufficient to sustain the vendor's lien under our statute. Joseph Farnsworth owned said 40-acre tract; he had a right to sell it; he did sell it, and the promissory notes involved in this case represented the consideration to be paid for said land by Pepper therefor, and the conveyance of said land by Benjamin Farnsworth to the respondent as effectually conveyed the title of said land to the appellant as if Benjamin Farnsworth had first conveyed it to the respondent and the respondent had then conveyed it to the appellant.

Finding no reversible error in the record, the judgment must be affirmed, and it is so ordered, with costs in favor of the respondent.

Budge and Morgan, JJ., concur.

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ON PETITION FOR REHEARING.

(April 27, 1915.)

BRIEF OF APPELLANT—ASSIGNMENT OF ERRORS—ATTORNEY'S FEE—VENDOR'S LIEN—DEFICIENCY JUDGMENT.

1. Under the provisions of rule 45 of the rules of this court, the brief of appellant must contain a distinct enumeration of the several errors relied upon.

2. Under the provisions of sec. 3441, Rev. Codes, a vendor's lien is only permitted as security for the balance remaining for whatever may be due on the unpaid purchase price of the land, and the attorney's fee allowed for foreclosing such lien and any other indebtedness or liability is not made a lien by the provisions of said section.

3. Where an action is brought to foreclose a vendor's lien, the judgment or decree may provide for a deficiency judgment in case the property charged with the lien does not sell for sufficient to pay the amount of the lien.

SULLIVAN, C. J.—A petition for rehearing has been filed in this case, and the first point made by the petitioner is that an attorney's fee of \$400 was allowed for the foreclosure of said vendor's lien, while under the statute a vendor's lien is only permitted as security for the unpaid purchase price and not for any other indebtedness or liability, and 3 Pomeroy's Equity Jurisprudence, sec. 1251, and *Gard v. Gard*, 108 Cal. 19, 40 Pac. 1059, are cited.

This point was not raised in the brief of appellant, and for that reason was not considered by the court in its opinion. Rule 45 of the rules of this court provides, among other things, that the brief of appellant shall contain a distinct enumeration of the several errors relied upon.

As a matter of fact, the trial court did adjudge that the attorney's fee allowed should be a lien upon said premises. While sec. 3441, Rev. Codes, provides for a vendor's lien upon property sold "for so much of the purchase price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer," under the provisions of said statute an

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attorney's fee for foreclosing the lien is not made a lien upon the land sold. Therefore, the judgment in this case must be modified to the extent of holding said attorney's fee not a lien upon the land in question.

It is next contended that since the decree provides for a deficiency judgment in case the property does not sell for sufficient to pay the debt, said judgment is absolutely void, because it provides for a deficiency judgment, and in support of that contention *Johnson v. McKinnon*, 54 Fla. 221, 127 Am. St. 135, 14 Ann. Cas. 180, 45 So. 23, 13 L. R. A., N. S., 874, a Florida case, is cited. In that case it is held that a deficiency decree may be entered only in suits for the foreclosure of mortgages, and if rendered in an action to enforce a vendor's lien, is not simply irregular or voidable, but absolutely void and subject to collateral attack. Under our statute we are not inclined to go to the extent held in that case.

Sec. 4520, Rev. Codes, provides, among other things, that sales of real estate under judgments of foreclosure of mortgages and liens are subject to redemption as in the case of sales under execution, "and if it appear from the sheriff's return that the proceeds are insufficient, and a balance still remains due, judgment can then be docketed for such balance against the defendant or defendants personally liable for the debt," etc. While this section is found under the title of "Actions for the Foreclosure of Mortgages," it clearly includes other liens as well as mortgage liens, and in three sections of said chapter we find the words "mortgage, lien or encumbrance." We do not think the court erred in providing for a deficiency judgment, since under our statute a multiplicity of suits is not favored, and there is no reason for not granting a deficiency judgment where the property does not sell for sufficient to pay the amount of the lien.

It is next contended that the court failed to consider the seventh assignment of error made in appellant's brief, to wit, the ruling of the trial court in refusing to permit the defendant to call the plaintiff for cross-examination under the statute (Sess. Laws 1909, p. 334). The court in its original decision in this case did not refer to that particular assignment

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of error, although the matter was considered and the court concluded that under the facts of the case said ruling of the trial court was not reversible error, since the appellant's own letters written after he had received the title to said land clearly show that he fully understood the matter and consented to receive the title from Benjamin Farnsworth.

The court also considered the point made by the appellant to the effect that the contract of sale referred to was in direct contravention of the rules and regulations of the department of the Interior regulating the transfer of a homestead entry or farm unit under a reclamation project. Although we did not touch upon that point in our former opinion, we fully considered the matter and concluded there was nothing in that point. The appellant received just the title he agreed to take; he now has the title to the land, and simply because there was a verbal understanding between the homestead entryman and the party with whom appellant contracted for the purchase of said land that such purchaser should receive a title to one-half of said homestead entry after the entryman had received title from the government, that cannot be a defense to an action to compel the appellant to pay what he agreed to pay for said land, since he has received a good title thereto under and by virtue of his own arrangement and contract with the homestead entryman.

The cause will be remanded for a modification of the findings and decree in accordance with the views expressed in this opinion, and a rehearing is denied.

Budge and Morgan, JJ., concur.

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(March 23, 1915.)

SARAH D. BOWER and J. E. BOWER, Her Husband,
Respondents, v. D. B. MOORMAN, AGNES E. PARKS
and JAMES COCHRAN, Appellants.

[147 Pac. 496.]

PARTIES INTERESTED—TITLE OF ACTIONS—CONFLICTING EVIDENCE—
SUBTERRANEAN WATERS—APPROPRIATION—INTERFERENCE—DIVER-
SION—ACTUAL PERMANENT DAMAGE—INJUNCTIVE RELIEF—FIND-
INGS OF FACT—INSUFFICIENT—CAUSE REMANDED.

1. Where it appears that the respondents are the owners in fee of the land upon which artesian wells are located and retain the right to the control and management of water flowing from said wells to the place of distribution, and where it further appears that said respondents are the owners of virtually all of the capital stock of a private corporation to which the right to the use of said waters has been conveyed by deed, a motion for a nonsuit in an action by them to enjoin interference with the flow of water from said wells on the ground that they are not parties in interest will not be entertained.

2. Where there is a substantial conflict in the evidence, the findings of the court will not be disturbed.

3. Sec. 3242, Rev. Codes, provides: "The right to the use of waters of rivers, streams, lakes, springs and subterranean waters may be acquired by appropriation."

4. As between appropriators of subterranean waters, the first in time is the first in right.

5. Where subterranean water exists in a state of nature throughout a tract of land the ownership of which is held in different proprietors, it would seem to be impossible to adopt a rule giving each proprietor the absolute right to withdraw all of the subterranean waters from his tract of land, and thus destroy the benefits made possible by the proper regulation of subterranean waters. And an injunction will issue to restrain any permanent interference by an adjoining land owner with the right to the use of subterranean water acquired by a prior appropriator.

6. Before a permanent injunction should issue in a case of this character, the evidence should clearly and conclusively establish that the real cause of the loss of water flowing from the well of a

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prior appropriator of subterranean water is the construction of the well of a junior appropriator of said subterranean water.

7. If the sinking of M.'s well to the depth that B.'s large well has been sunk, or to a greater depth, would not interfere with the flow of the water in B.'s well, or if there was a loss of water in B.'s well occasioned by the sinking of M.'s well, which, in like quantity, could be returned to B.'s well without material damage, and at the same time water secured in M.'s well, the court would not be justified in issuing a permanent injunction preventing the completion of M.'s well.

8. Should it become necessary to change the method or means of diverting water by a prior appropriator of subterranean waters, that, in and of itself, should not deprive a subsequent appropriator from acquiring unappropriated subterranean water, unless it further appeared that it would be impossible to deliver said water to the diverting works of the prior appropriator.

9. Although it may be found that in the sinking of a well by a land owner direct communication was made with the same artesian belt or basin tapped by an adjoining land owner, who was a prior appropriator of subterranean water, the court would not be justified in issuing a perpetual injunction prohibiting the completion of the well of a junior appropriator of subterranean waters, unless it further conclusively appeared that the prior appropriator would suffer permanent loss of water by reason of the tapping of said artesian belt or basin.

10. The fact that the sinking of a well would endanger the supply of water flowing from a well on adjoining land owned by a prior appropriator of subterranean waters, would not justify the issuance of a permanent injunction, unless it were conclusively shown that the water supply of the first appropriator would be actually and permanently diminished.

11. If, in the sinking of a well, the flow from a well of an adjoining land owner and prior appropriator of subterranean water is lessened, before a permanent injunction should issue, it must be conclusively established that the water so lost cannot be returned from the well of the subsequent appropriator to the diversion works of the prior appropriator.

12. *Held*, that the findings of fact are not sufficient to support the judgment, and it is accordingly ordered that the case be remanded to the district court with directions to suspend the injunction, permitting appellants to continue the construction of the well on said lot 5, until it is established that by reason of the sinking of appellants' well the respondents' well will sustain a material and permanent loss of water supply; and if it shall later appear to the

Argument for Appellants.

satisfaction of the district court that said actual loss of water has been sustained in respondents' well due to the construction of appellants' well, and such water cannot be returned to the diversion works of respondents, said injunction should be reinstated, permanently closing the well of appellants.

APPEAL from the District Court of the Fourth Judicial District, Twin Falls County. Hon. C. O. Stockslager, Judge.

Action to perpetually restrain the construction of artesian well. Judgment for plaintiff. *Modified.*

A. M. Bowen and George Herriott, for Appellants.

Land owners whose lands overlie the same artesian basin have coextensive rights to water from such artesian basin, and one land owner cannot convey such water outside the basin for sale or use to the injury of another land owner in the same basin. (*Katz v. Walkinshaw*, 141 Cal. 116, 99 Am. St. 35, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236; 2 *Wiel* on Water Rights, 3d ed., p. 974, and cases cited.)

Digging a well upon one's own land to obtain water to irrigate his land within the artesian basin is a reasonable use of his land, and is lawful, even though such well may deprive another land owner within the basin of a certain amount of water. (1 *Wiel*, 3d ed., p. 812, and cases cited; 2 *Wiel*, 3d ed., p. 1067, sec. 1140.)

The appropriation doctrine as to surface streams commonly called the "Colorado Doctrine" and such as we have in this state does not apply to percolating waters. (2 *Wiel*, 3d ed., p. 1040.)

"The spirit of the new law of percolating water, as well as the rulings under it, make directly against the law of exclusive rights by priority of appropriation." (*Sullivan v. Northern Spy Min. Co.*, 11 Utah, 438, 40 Pac. 709, 30 L. R. A. 186; 2 *Wiel*, 3d ed., p. 1045, sec. 1106, and cases cited.)

The law relative to percolating water in the soil, whether diffused or tributary to wells or springs or artesian supply, is separate and distinct from the law of appropriation. In some of the arid states, recognizing priority of appropriation

Argument for Appellants.

it is held that the common law prevails as to percolating water, and the owner of the soil has absolute control of percolating water in the soil even though its use may dry up the well of another. (*Sullivan v. Northern Spy Min. Co.*, *supra*; *Southern Pacific Ry. Co. v. Dufour*, 95 Cal. 615, 30 Pac. 783, 19 L. R. A. 92; *Mosier v. Caldwell*, 7 Nev. 363; *Crescent M. Co. v. Silver King M. Co.*, 17 Utah, 444, 70 Am. St. 810, 54 Pac. 244; *Willow Cr. Irr. Co. v. Michaelson*, 21 Utah, 248, 81 Am. St. 687, 60 Pac. 943, 51 L. R. A. 280. See notes, 30 L. R. A. 186; 9 L. R. A. 92; 21 L. R. A., N. S., 76.)

In other states the common law has been modified by allowing the owner of land containing percolating water feeding springs, wells or artesian basins the right only to a reasonable use of such water. This rule is the one now generally recognized. (*Pence v. Carney*, 58 W. Va. 296, 112 Am. St. 963, 52 S. E. 702, 6 L. R. A., N. S., 266; *Cohen v. La Canada L. & W. Co.*, 142 Cal. 437, 76 Pac. 47; *Stillwater Water Co. v. Farmer*, 89 Minn. 58, 99 Am. St. 541, 93 N. W. 907, 60 L. R. A. 875; *Barclay v. Abraham*, 121 Iowa, 619, 100 Am. St. 365, 96 N. W. 1080, 64 L. R. A. 255.)

So far as we are aware, it has never been held anywhere that percolating water in the soil is anything but a part of the soil itself, and not subject to appropriation. Some courts limit the land owner's right to a reasonable use, others allow him correlative rights, and others give him absolute control, but always he has the right to some use thereof. (*Willow Cr. Irr. Co. v. Michaelson*, *supra*; *Howard v. Perrin*, 8 Ariz. 347, 76 Pac. 460; *Crescent Min. Co. v. Silver King Min. Co.*, 17 Utah, 444, 70 Am. St. 810, 54 Pac. 244; *Katz v. Walkinshaw*, *supra*; *City of Emporia v. Soden*, 25 Kan. 588, 37 Am. Rep. 265; *Boyce v. Cupper*, 37 Or. 256, 61 Pac. 642; *Case v. Hoffman*, 100 Wis. 314, 72 N. W. 390, 74 N. W. 220, 75 N. W. 945, 44 L. R. A. 728; *Mosier v. Caldwell*, 7 Nev. 363.)

Under the constitution and statutes of Idaho, the only waters subject to appropriation are public waters. This consists of waters flowing in their natural channels, springs and lakes. The term "subterranean waters" as used in sec. 3242 must therefore refer to such underground bodies or streams

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as would be considered public waters. (Const., art. 15; Rev. Codes, secs. 3240, 3253, 3268; *Walbridge v. Robinson*, 22 Ida. 236, 125 Pac. 812, 43 L. R. A., N. S., 240.)

The only waters to which the legislature could grant the right of appropriation would be public waters; any interference with private waters would be a violation of the rights of private property. (*King v. Chamberlin*, 20 Ida. 504, 118 Pac. 1099; *Wiel on Water Rights*, sec. 233.)

The burden of proof as to the existence of an underground stream is on him who asserts the same. In the absence of a showing the presumption is that underground water is percolating water. (2 *Kinney on Irrigation*, p. 2116, and cases cited; *Barclay v. Abraham*, *supra*; *Case v. Hoffman*, *supra*; *Mosier v. Caldwell*, *supra*.)

Even though plaintiff has a right to the water of the artesian flow already tapped or threatened to be tapped by defendant, defendant would be entitled to any surplus, and also entitled to same when not used by plaintiffs. (*Smith v. Hawkins*, 120 Cal. 86, 52 Pac. 139; *Salt Lake City v. Salt Lake City Water etc. Power Co.*, 24 Utah, 249, 67 Pac. 672, 61 L. R. A. 648; *Mann v. Parker*, 48 Or. 321, 86 Pac. 598; *Saint v. Guerrerio*, 17 Colo. 448, 31 Am. St. 320, 30 Pac. 335; *Hutchinson v. Watson Slough Ditch Co.*, 16 Ida. 484, 133 Am. St. 125, 101 Pac. 1059; *Burr v. MacClay R. W. Co.*, 154 Cal. 428, 98 Pac. 260.)

Even though defendants should tap and divert water from the same source as plaintiff, defendant would be entitled to all over the amount to which plaintiff may be entitled, or which he would use. If the amount were found inadequate, a court could require the temporary or permanent closing of defendant's well. The injury would be reparable, and there is no equity, otherwise arising warranting an injunction. As a general rule, an injunction will not lie where any injury is reparable. (22 *Cyc.* 762; also 929; *California Nev. Co. v. Union Transp. Co.*, 122 Cal. 641, 55 Pac. 591; *State Bank v. Rohren*, 55 Neb. 223, 75 N. W. 543; *Thorn v. Sweeney*, 12 Nev. 251; *Portland v. Baker*, 8 Or. 356; *Leitham v. Cusick*, 1 Utah, 242.)

Argument for Appellants.

The plaintiffs cannot deprive defendant of the right to bore and prospect for water on the theory that they will be deprived of the use of the tank, for even if plaintiffs have prior rights to the water, which has or may hereafter be tapped by defendants, the actual flow to which they are entitled is the only thing a court of equity will protect by injunction. (*Kinney on Irr.*, sec. 724, p. 1247; *Salt Lake v. Gardner* (Utah), 114 Pac. 147; *Schodde v. Land & Water Co.*, 224 U. S. 107, 32 Sup. Ct. 470, 56 L. ed. 686; S. C., 161 Fed. 43, 88 C. C. A. 207.)

The plaintiffs were awarded an injunction upon an apprehended injury which was merely a guess or a possibility. To warrant a permanent injunction there must be reasonable grounds for apprehending actual injury and a showing that there is reasonable probability the injury will occur. (*Boise Dev. Co. v. Idaho Trust etc. Bank*, 24 Ida. 36, 133 Pac. 916; *Lorenz v. Waldron*, 96 Cal. 243, 31 Pac. 54; *Genet v. Delaware & H. Canal Co.*, 122 N. Y. 505, 25 N. E. 922; *Hurd v. Atchison etc. Ry. Co.*, 73 Kan. 83, 84 Pac. 553; *Lester Real Estate Co. v. St. Louis*, 169 Mo. 227, 69 S. W. 300; *Bigelow v. Bridge Co.*, 14 Conn. 565, 36 Am. Dec. 502; 22 Cyc. 758, and cases cited.)

Even in cases of temporary injunction, it should not be granted upon a mere possibility of injury. (*Montana O. P. Co. v. Boston & M. Con. C. & S. Min. Co.*, 22 Mont. 159, 56 Pac. 120.)

To authorize an injunction, violation of plaintiff's rights must be of such a nature as is, or will be, attended with substantial or serious damage. (*Stauffer v. Cincinnati etc. R. Co.*, 33 Ind. App. 356, 70 N. E. 543; *Steffes v. Moran*, 68 Mich. 291, 36 N. W. 76; *Tanner v. Nelson*, 25 Utah, 226, 70 Pac. 984; *Jacob v. Day*, 111 Cal. 571, 44 Pac. 243; *Hall v. Rood*, 40 Mich. 46, 29 Am. Rep. 528.)

Plaintiffs have no actual interest in the Bower well, the entire flow having been deeded to the Artesian City corporation. This being true, injunctive relief should not have been awarded. (2 *Kinney on Irrigation*, p. 2907.)

Argument for Respondents.

The return of the water so that they can apply same to the same beneficial use is all the plaintiffs could ask, even though water was tapped by defendants. (*Chandler v. Austin*, 4 Ariz. 346, 42 Pac. 483.)

J. C. Rogers, C. O. Longley and W. P. Guthrie, for Respondents.

California had not provided by statute for the appropriation of subterranean water at all at the time the decisions cited by appellant were made. The same seems to be true with regard to the other states, whose decisions have been quoted in appellant's brief and reviewed by Mr. Wiel in his work on Water Rights in the Western States. But this array of authorities is all swept away by the positive statute law of this state, which provides for the appropriation of subterranean water in the same way and manner that surface streams are appropriated, and the effect of the appropriation is also declared to be the same, that is, the first in time is first in right. (Sec. 3242, Rev. Codes.)

This court held in *Le Quime v. Chambers*, 15 Ida. 405, 98 Pac. 415, 21 L. R. A., N. S., 76, "that even percolating water is subject to appropriation under our statutes."

The supreme court of California in *Vineland Irr. Dist. v. Azusa Irr. Co.*, 126 Cal. 486, 58 Pac. 1057, 46 L. R. A. 820, defines percolating water to be "wandering drops moving by gravity in any and every direction along the line of the least resistance."

Any person may sue for an interference with the possession or property if he has the right to the immediate possession as against defendant. (30 Cyc. 34, par. 3.)

A suit in equity not only may, but must, be brought in the name of the beneficial owner. (*Smith v. Brittenham*, 109 Ill. 540; *Sears v. Ackerman*, 138 Cal. 583, 72 Pac. 171.)

Courts will look beyond the mere title of an action or proceeding for the purpose of determining who are interested and affected as parties. (*Van Camp v. Board of County Commrs.*, 2 Ida. 29, 2 Pac. 721.)

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Where there is a substantial conflict in the evidence, the findings of the trial court will not be disturbed. (*Heckman v. Espey*, 12 Ida. 755, 88 Pac. 80.)

Nor where there is a substantial conflict in the evidence, on material issues involved. (*Robertson v. Moore*, 10 Ida. 115, 77 Pac. 218; *Deeds v. Stephens*, 10 Ida. 332, 79 Pac. 77; *Small v. Harrington*, 10 Ida. 499, 79 Pac. 461; *Spencer v. Morgan*, 10 Ida. 542, 79 Pac. 459; *Watson v. Molden*, 10 Ida. 570, 79 Pac. 503; *Abbott v. Reedy*, 9 Ida. 577, 75 Pac. 764; *Parke v. Boulware*, 9 Ida. 225, 73 Pac. 19; *Cash Hardware Co. v. Sweeney*, 9 Ida. 148, 72 Pac. 826.)

BUDGE, J.—This is an appeal from a judgment entered in the district court of the fourth judicial district in Twin Falls county, in favor of the respondents, perpetually enjoining appellants from driving or maintaining an artesian well on lot 5; or from in any manner or by any means interfering with the waters flowing or which might flow from respondents' wells, which are located on lot 4, adjoining appellants' said lot; or from doing any act that would interfere with the flow or use of the water flowing from the wells of respondents.

It appears from the record that some years prior to the commencement of this action, respondents sunk several artesian wells upon lot 4, section 31, township 11 south, range 20 east, B. M. Two of these wells were dug to a depth of 360 feet, and are but a few feet apart, discharging the water flowing therefrom into a cement tank built around said wells. It further appears that before the cement tank was built, a well was dug where the tank now stands and still discharges some water underneath the tank. There is another well located about ten feet north of the cement tank and still another about 100 feet west of said tank. All of the wells outside the cement basin flow a limited amount of water and vary in depth from 110 feet to 320 feet. A measurement of all of the water flowing from respondents' wells was made prior to the bringing of this suit, and showed a combined flow of 254 inches.

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Previous to the bringing of this action, the respondent Bower and his wife sold the right to the use of practically all the water flowing from said wells located upon their lands to the Artesian Water Company, a corporation, incorporated under the laws of this state—which corporation is not a party to this action. Bowers and his wife did not warrant that the flow of water from said wells would be a continuous flow of any fixed number of inches, or that said water would be furnished at all times.

Before the commencement of this action in the district court, and prior to the issuance of the injunction herein, appellants had commenced the drilling of an artesian well upon said lot 5, adjacent to the property of the respondents and within 300 feet of respondents' wells, and had reached a depth of approximately 200 feet when they were enjoined from further prosecuting said work.

There is evidence in the record to the effect that when the respondents' large well, which is located within the cement tank, was drilled, it was of sufficient size to admit an eight-inch casing down to a depth of about 85 feet, and that eight-inch casing was used to that depth, at which point it became necessary to reduce the diameter of said well to six inches, from which point a six-inch casing was continued down to the present depth of the well. Said six-inch casing was telescoped inside the eight-inch casing, and when the water-gate, or valve, which controls the flow of the water at the top of the pipe was placed, the same was screwed into the eight-inch casing, instead of the six-inch casing, and when this valve is closed to shut off the flow of water, the pressure forces the water down between the casings and it escapes at the bottom of the eight-inch casing, about eighty-five feet below the surface of the ground. At the time this action was brought, the appellants' well was flowing about three inches of water. When the respondents' large well within the cement tank is shut off, or partially shut off, within a few minutes thereafter the appellants' well will commence to flow an increased amount of water to the extent of twenty-five or thirty inches, and the small wells heretofore referred to, on the respond-

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ents' premises and outside the cement basin, likewise increase their flow in practically the same proportion. But when the respondents' small wells, which are outside the cement basin, are shut off, it does not seem to affect the flow of water in the appellants' well; neither does it appear that the sinking of appellants' well to its present depth has in any manner affected the flow of water from respondents' smaller wells.

Appellants filed a demurrer to respondents' complaint and the same was by the trial judge overruled. We have examined the respondents' complaint and in our opinion it states a cause of action. Therefore, the court did not err in overruling appellants' demurrer.

It is next contended that the court erred in overruling a motion for nonsuit made by the appellant at the close of the introduction of respondents' evidence.

The first, third and fourth assignments of error set out in support of appellants' motion for nonsuit are, as we view the facts in this case, without merit, and we do not consider said assignments of sufficient importance to discuss them at this time, other than to say that they involve questions that will be considered and determined by this court in reaching its conclusion upon the merits of this case.

The second assignment of error urged in support of appellants' motion for nonsuit is entitled to consideration, and is as follows: "The evidence shows without conflict that the plaintiffs were not the owners of the water coming from what are called the Bowers wells, but that such water is owned by the Artesian Water Company, an Idaho corporation, and that no rights to any of the waters of said wells which plaintiffs may have, have ever been interfered with by the sinking of defendants' well." Counsel for appellants contend that the plaintiffs below, by reason of having conveyed by deed the right to the use of the waters flowing from the wells located upon plaintiffs' premises to the Artesian Water Company, a corporation, during the irrigation season and for the balance of the year such an amount only as was necessary for domestic purposes, prior to the commencement of this action

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in the trial court, would not be authorized, under the law, to maintain this action against the defendants.

It appears from the record in this case that about September, 1909, the respondents, by deed, conveyed to the Artesian Water Company, a corporation, 262 inches of water flowing and to flow from the wells in question, located upon respondent's land, for use during irrigation season, and during the balance of the season such an amount of water as was necessary for domestic purposes; the grantors retaining control of the waters and the possession of the land upon which the wells are situated, and also retaining the right to control the flow of the water to the place or places of distribution to the consumers. It also appears that the respondents were virtually the owners of all of the capital stock of said Artesian Water Company, and that Bower and his wife were president and secretary, respectively, of said corporation.

Sec. 4090, Rev. Codes, provides: "Every action must be prosecuted in the name of the real party in interest, except as otherwise provided by this code." In the case of *Van Camp v. Board of County Commrs.*, 2 Ida. 29, 2 Pac. 721, this court said: ". . . . It would be the duty of the court to look beyond the mere title to ascertain who are interested and affected as parties." We think the general rule to be that "Although a legal title is necessary for a standing as plaintiff in a court of law, it does not follow that the complete legal title is necessary. Thus, any person may sue for an interference with the possession if he has the right to the immediate possession as against defendant." (30 Cyc., p. 34, par. 3.) Sec. 4105, Rev. Codes, provides that ". . . . When the question is one of a common or general interest of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all." And as said by the court in the case of *Olds v. Cummings*, 31 Ill. 188: "Courts of equity will not be confined to legal forms and legal titles, but look beyond these, to the substantial, equitable rights of parties." In the case of *Gilpin v. Sierra Nev. Con. Min. Co.*, 2 Ida. 696, 23 Pac. 547, 1014, it is said: ". . . . Nonjoinder

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of parties plaintiff . . . is not properly in issue on an application for an injunction against the acts of a stranger to the property threatened with injury."

From the above statement of facts, and under the authorities cited, it clearly appears that the respondents were the real parties in interest, and had the right to maintain this action against the appellants for interfering with the water of said wells, the same being lawfully in their possession, although they were obligated under their deed to deliver water to the users thereof at some distant point. The respondents were entitled to the right to the use of water flowing from said wells by reason of prior appropriation, provided said water had been put to a beneficial use. Therefore, the court did not err in denying appellants' motion for a nonsuit.

The trial court in its findings of fact, among other things, found that the loss of water in respondents' well was caused directly or indirectly by the sinking of appellants' well, which was manifested by the increased flow therefrom; that the further sinking of appellants' well would endanger the supply of the water flowing from the respondents' well, in case the appellants should secure a portion of the artesian flow now coming through the respondents' well, which they could not, by gravity flow, replace in the cement tank or basin surrounding the large wells of the respondents, and that the construction of appellants' well had opened a direct channel or communication with the same artesian belt or basin tapped by the respondents. Appellants insist that the findings of the court are not supported by the evidence, and the testimony without material conflict establishes the fact that if any loss occurred in the Bower wells by the sinking of appellants' well, such loss was the fault of the respondents, by permitting a defective casing to exist in the large well; that there was no evidence to support the court's findings that the further sinking of appellants' well will endanger the supply of water flowing from respondents' well; that there is no evidence to show that the water, if obtained in appellants' well, could not be made to flow by gravity to and into the tank surrounding the respondents' well, and that the evidence utterly fails

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to establish the opening up of a communication with the artesian basin tapped by the respondents.

There is a substantial conflict in the testimony involving the loss of the flow of water in the large wells of respondents within the cement tank or basin, as to whether the loss was caused by defective construction of respondents' large well, or by closing the valve at the top of the large well, thus forcing the water out of the well at the point where the eight and six-inch pipes are joined, eighty-five feet below the surface of the ground, resulting in the water percolating through the soil into the appellants' well increasing the flow; or whether the loss was occasioned by appellants' well, during the construction thereof, coming in direct contact with the underground channel, artesian belt or basin of water from which respondents' wells are supplied. This being true, under the accepted rule, "Where there is a substantial conflict in the evidence, the findings of the trial court will not be disturbed." (*Heckman v. Espey*, 12 Ida. 755, 88 Pac. 80; *Huften v. Huften*, 25 Ida. 96, 136 Pac. 605; *Henry Gold Min. Co. v. Henry*, 25 Ida. 333, 137 Pac. 523.) When the evidence is extensive and in conflict, findings of the trial court will not be reversed on appeal. (*Commercial Trust Co. v. Idaho Brick Co.*, 25 Ida. 755, 139 Pac. 1004.)

It is now necessary to decide whether the findings of fact made by the trial court are sufficient to support the judgment, and in doing so there are three pertinent questions to be considered: First, the right of a land owner to drive a well on his own land in order to obtain subterranean waters; second, to what depth and under what conditions may a well be driven before a permanent injunction will lie at the instance of an adjoining land owner, who is a prior appropriator of subterranean waters, for an interference with the flow of water in said adjoining land owner's well; third, are subterranean waters in this state subject to appropriation for a beneficial use.

Percolating waters have been defined by the supreme court of California, in the case of *Los Angeles v. Hunter*, 156 Cal. 603, as "vagrant, wandering drops moving by gravity in any

and every direction along the line of least resistance.” Percolating waters have been subdivided into various classes. However, we do not deem it necessary to discuss these classes.

While the law governing the right to the use of percolating waters is new in this state, there are many decisions, both in England and in the United States, defining the common law and the various statutory enactments which govern the right to the use of percolating waters. In the case of *Broadbent v. Ramsbotham*, 11 Exch. Rep. 602, the court held: “All the water flowing from Heaven and shed upon the surface of the hill at the foot of which a brook runs must, by the natural course of gravity, find its way to the bottom and so into the brook; but this does not prevent the owner of the land on which it falls from dealing with it as he may please and appropriating it. He cannot do so if the water has arrived at and is flowing in some definite channel.” In the case of *Acton v. Blundell*, 12 Mees. & W. 324, the court of exchequer was of the opinion that the owner of the surface might apply subterranean water as he pleased, and that any inconvenience to his neighbor from so doing was *damnum absque injuria*; further observing “that the existence and state of underground waters is generally unknown before a well is made; and after it is made there is the difficulty of knowing exactly how much, if any, of the water of the well, when the ground was in its natural state, belonged to the owner in right of his property in the soil, and how much belonging to his neighbor. These practical uncertainties made it very reasonable not to apply the rules which regulate the enjoyment of streams and waters above ground to subterranean waters.” It might, however, be said that the common law of England was to the effect that percolating waters belonged to the persons owning the land, and could be used by such persons as they might please, without liability to anyone.

Percolating water has not received the attention of legislative bodies that has been given to running water in natural channels or surface water generally, for the reason that it is invisible and requires practical demonstration to determine to what extent, if any, the sinking of additional wells; the

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creating of additional springs; adding to the flow of springs by opening up and removing the surface of the earth; or by reason of installing pipes or other contrivances for the purpose of overcoming natural resistance to the free flow of percolating waters, may affect the water supply.

In the case of *Acton v. Blundell*, *supra*, the court held that percolating water "falls within the principle which gives to the owner of the soil all that lies beneath his surface; that the land immediately below is his property, whether it be solid rock, or porous ground, or venous earth, or part soil, part water; that the person who owns the surface may dig therein, and apply all that is found to his own purposes at free will and pleasure."

Some courts have gone so far as to hold that one may purchase land in order to secure the percolating water for the purpose of furnishing a municipal water supply, and not be liable to the owners of the adjoining land, although the wells thereon be destroyed. In the case of *Huber v. Merkle*, 117 Wis. 355, 98 Am. St. 933, 94 N. W. 354, 62 L. R. A. 589—a comparatively recent case—the supreme court held in substance, that a land owner has the right to sink a well on his own land and use the water therefrom for any purpose he chooses, or even to allow it to flow away, regardless of the effect on his neighbor's wells, and that such right is not affected by malicious intent. The reason for the rule is announced in the case of *Chatfield v. Wilson*, 28 Vt. 49, as follows: "The secret, changeable, and uncontrollable character of underground water in its operations is so diverse and uncertain that we cannot well subject it to the regulations of law, nor build upon it a system of rules, as is done in the case of surface streams." In the case of *Greenleaf v. Francis*, 18 Pick. (Mass.) 117, where the lots of the plaintiff and defendant adjoined each other, the plaintiff's well was dug fourteen years prior to the time the defendant dug his well. By the digging of defendant's well the water in plaintiff's well was very materially diminished. The court held in effect that everyone has the liberty of doing in his own ground whatsoever he pleases, even though it should occasion to his neigh-

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bor some other sort of inconvenience, and that the defendant having dug his well on his own ground, where it would be most convenient for him, it was the lawful act, and although it may have been prejudicial to the plaintiff, it was *damnum absque injuria*; and that the plaintiff could not recover or enjoin the defendant in the construction or use of his well. The supreme court of Georgia announced the rule in that state to be that the owner of land had no right in the water percolating beneath it, which the law recognized, and in *Warder v. Springfield*, 9 Ohio Dec. 885, it was held that percolating water was not properly within the protection of the constitution.

Under the common law of England, adopted in whole or in part as the law of this country by several of the states in the Union, confusion has resulted rather than uniform enactment of legislation controlling the right to the use of percolating waters. The supreme court of California, in the case of *Katz v. Walkinshaw*, found in 141 Cal. 116, 99 Am. St. 35, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236, refused to follow the English rule or to recognize decisions of the state of Wisconsin and the rule of law as announced of a similar character by several other states relative to the ownership of percolating waters in California. However, in that case there were some facts which differ from the facts in the case at bar. There was also involved the further proposition, viz., whether one who has developed artesian wells within a catch or artesian basin has the right to conduct the water beyond the artesian belt or basin, and thus deprive land owners within such artesian belt or basin of the right to the use of underlying waters for beneficial purposes. That court adopted what it was pleased to term the doctrine of "reasonable use," or "correlative rights," for the purpose of affording protection to the owners of property within an artesian belt or basin, in order to encourage proper development of the lands located within such basin; holding in effect that each land owner of soil lying in a belt which became saturated with percolating water was entitled to a reasonable use thereof on his own land, notwithstanding such reasonable use inter-

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fered with the water percolating in his neighbor's soil, but that he had no right to injure his neighbors by an unreasonable diversion of the waters percolating in the belt, for the purpose of sale or carriage to distant lands. In support of this doctrine, the supreme court of California relies upon the principles of law applied in the case of *Smith v. City of Brooklyn*, 18 App. Div. 340, 46 N. Y. Supp. 141, and the case of *Forebell v. City of New York*, 164 N. Y. 522, 79 Am. St. 666, 58 N. E. 644, 51 L. R. A. 695. In the former case, it appears that the city of Brooklyn, for the purpose of furnishing a municipal water supply, sunk certain wells on its own land and pumped the percolating waters therefrom, transmitting the same some distance to the city for municipal purposes, and by the use of powerful pumps, withdrew the percolating waters from lands adjoining the wells. The court said: "While it is true that the city owned the land upon which it placed its structure and all of its acts were done upon its own property, it did not, however, make the erections or do the acts . . . for any purpose of domestic use, agriculture, mining, or manufacturing, as land was used in the cases which have arisen in this country. No one dwelt thereon or was expected to. No one used the waters thereon, nor was it expected to be used in connection therewith. The sole purpose was to subordinate the use of the land to the particular purpose of a reservoir and conduit in which to gather, store and carry water to a distant place for its benefit and profit. . . . It was its purpose not only to take the water which might come by natural percolation upon its land, but also to use artificial means . . . drain the adjoining land of its water. This purpose has been accomplished, and by the construction of its conduit, the sinking of its wells . . . the whole spring level of the surrounding country has been lowered, and running streams and ponds dried up." The court held that the city was liable for damages to the adjoining land owners. This case was affirmed by the supreme court in *Merrick Water Co. v. Brooklyn*, 32 App. Div. 454, 53 N. Y. Supp. 10. In the latter case the city of New York had sunk wells on its own land, constructed machinery, pumped the percolating water

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from under the surface of its own land, and transported the same some distance for municipal purposes. By this act, the percolating waters under the surface of the adjoining lands were extracted and the land owners prevented from raising crops thereon. The court said: "Before the defendant constructed its wells and pumping stations, it ascertained, at least to a business certainty, that such was the percolation and underground flow or situation of the waters in its own and plaintiff's land that it could by these wells and appliances cause or compel the water of plaintiff's land to flow into its own wells, and thus deprive plaintiff of his natural supply of underground water," thus showing that the action was intentional on the part of the city. The court below followed the case of *Smith v. City of Brooklyn*, *supra*, and granted a perpetual injunction against the city from operating its engine-driven wells and pumping stations on the land adjoining plaintiff's land and awarded past damages.

Where percolating water exists in a state of nature generally throughout a tract of land that has been subdivided, the ownership of which is held in different proprietors, it would seem to be an impossible rule to adopt, whereby each proprietor is given the absolute right to withdraw all of the percolating waters underneath the ground owned by each one, by the driving of wells and installing of powerful pumps, or the withdrawal of the waters in any other manner that might be possible by reason of recent inventions, and thus destroy the benefits made possible by the proper regulation of percolating waters obtained by any of the above methods, for a beneficial use; and an injunction will issue to restrain any permanent interference by an adjacent land owner with the right to the use of subterranean waters acquired by a prior appropriator. No doubt, in many instances, it can be positively demonstrated that underground waters exist in large quantities, and where that can be done, a solution of the difficulties incident to the right to the use of percolating waters might be readily arrived at. However, where there exists great uncertainty as to the amount of underground water and the damage incident to the destruction and entire loss of the flow of the same—

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which is true in the case at bar—we are confronted with a problem that is not so easily solved.

The appellants are the owners in fee of an acre of land located in lot 5, section 6, township 12 south of range 20, east of Boise meridian, in Cassia county, Idaho, situated within 300 feet of the cement basin within which the large wells of the respondents are located. This acre of land was purchased, as appears from the record, for the express purpose of constructing thereon a flowing well or wells in order to obtain water to irrigate a considerable tract of land owned by the appellants about a mile and one-quarter northeast of said lot 5. After appellants had sunk their well about 200 feet, respondents brought suit in the district court and secured an order restraining appellants from further prosecuting the work of sinking their well, alleging that in so doing the flow of water in respondents' wells was interfered with and materially lessened.

A land owner may discover by the use of modern appliances in driving wells, a flow of water sufficient in quantity to properly irrigate a considerable tract of land, and relying upon his right to the use of the water discovered and brought under his control, expend a considerable amount of money in improvements, making his homestead attractive to his neighbor by reason of advanced development of his crops, fruit trees and shrubbery. The neighbor thereupon undertakes to discover the same source of water supply, and in order to make assurance doubly sure, begins the construction of his well as close as possible to the well of the first appropriator; and in digging this well a crevasse might be opened and the entire water supply lost, or an additional water supply found, ample for the needs of both. Thus, the importance of the question, as to what extent and under what conditions a junior appropriator of subterranean water may be permitted to prospect for said subterranean water, is impressed upon us.

Sec. 3242, Rev. Codes, provides that "The right to the use of waters of rivers, streams, lakes, springs and subterranean waters may be acquired by appropriation." In the case of *Le Quime v. Chambers*, 15 Ida. 405, 98 Pac. 415, 21 L. R. A.,

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N. S., 76, the court says in effect, that percolating water is subject to appropriation under our statute, and as such will be recognized and protected by the courts. Sec. 3245, Rev. Codes, provides: "As between appropriators, the first in time is the first in right." The first appropriator of water for a useful or beneficial purpose has the prior right thereto, and the right once vested, will be protected and upheld, unless abandoned. (*Malad Valley Irr. Co. v. Campbell*, 2 Ida. 411, 18 Pac. 52; *Goertson v. Barrack*, 3 Ida. 344, 29 Pac. 42; *Dunniway v. Lawson*, 6 Ida. 28, 51 Pac. 1032; *Kirk v. Bartholemew*, 3 Ida. 367, 29 Pac. 40; *Lee v. Hanford*, 21 Ida. 330, 121 Pac. 558; *Nielson v. Parker*, 19 Ida. 730, 115 Pac. 488.) Any interference with a vested right to the use of water, whether from open streams, lakes, ponds, percolating or subterranean water, would entitle the party injured to damages, and an injunction would issue perpetually restraining any such interference.

The evidence offered by the respondents in this case to establish the loss of water in their wells by reason of the construction of the appellants' well is not as clear and conclusive as we think it should be in a case of this character, in order to justify the issuance of a perpetual injunction. There is evidence in the record that establishes the theory of appellants, that the cause of the loss of the 36 miner's inches of water in the Bower wells between September 5, 1912, and November 17, 1912, was caused by capping the large Bower well and forcing the water to escape through the joint where the eight-inch pipe connects with the six-inch pipe, thus filling the ground with water which found its way into the Moorman well. This conclusion is further established by the fact that the small wells upon the Bower lands would increase their flow to approximately the same extent as appellants' well, when respondents' large well within the cement basin was shut down. Had the wells been permitted to flow freely without any obstruction and in the usual and ordinary manner, it could then easily have been determined whether there was a loss of water in the Bower wells, and if this were found to be true, it would necessarily follow that it was caused by reason of the construc-

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tion of the Moorman well. The court found in finding 15, "That the loss of water sustained by the plaintiffs was caused directly or indirectly by the sinking of the defendants' said well." This finding is too indefinite and uncertain upon which to base a perpetual injunction. An injunction should not issue in a case of this character, unless the testimony is direct and positive and furnishes sufficient proof to enable the court to find the real cause of the loss of water, and that such loss must be conclusively proven to be caused by the construction of the Moorman well and from no other cause. A writ of injunction will not issue to restrain an act already done. (*Wilson v. Boise City*, 7 Ida. 69, 60 Pac. 84; 22 Cyc. 759.) An injunction should not issue to enjoin the prosecution of the work on the well to its completion, unless it was conclusively established that the construction or completion of said well would result in a permanent injury to the respondents by the loss in whole or in part of the waters flowing from the wells located upon respondents' premises. In the case of *Boise Development Co. v. Idaho etc. Bank*, 24 Ida. 36, 133 Pac. 916, this court stated in substance that to warrant a permanent injunction, there must be a showing of real or imminent danger of damage. The threatened injury must be material and actual. An injunction cannot be granted to allay the fears and apprehensions the respondents have as to what may occur in the future. It is incumbent upon respondents to show that the acts against which they ask protection are not only threatened, but will in all probability be committed to their permanent injury. Such injury must be material and actual and not fanciful, theoretical or merely possible.

If the sinking of the Moorman well to the depth that the larger Bower wells have been sunk, or to a greater depth, would not interfere with the flow of the water in the Bower wells, or if there was a loss of water in the Bower wells that could be returned without material damages to respondents' well and at the same time the Moorman well be supplied with water, the court would not be justified in preventing the completion of the Moorman well.

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Finding 16 by the court is not sufficient to support the judgment wherein the court finds that "the further sinking of said well by the defendants would endanger the supply of water flowing from plaintiffs' said wells; and in case the defendants should secure a portion of the artesian flow now coming through plaintiffs' said wells, the defendants could not by gravity flow replace such water where the same is now flowing, to wit, in the cement tank or basin surrounding the two large wells of the plaintiffs . . . that the construction of defendants' said well has opened a direct channel or communication with the same artesian belt or basin tapped by the Bowers' well situated in the tank or basin." The issuing of a perpetual injunction would not be justified, should it become necessary to destroy the cement tank or basin within which the Bower wells are situated, if no permanent loss of water was caused. The necessity for changing the method or means of diverting the water from the cement tank or basin would not, of itself, deprive a subsequent appropriator of the right to divert and use unappropriated subterranean water. While the subsequent appropriator would be liable in damages, he would have the right to divert surplus subterranean waters. (*Salt Lake City v. Gardner*, 39 Utah, 30, 114 Pac. 147.)

If the construction of appellants' well as found by the court has opened up a direct channel or communication with the same artesian belt or basin tapped by the Bower wells located in the tank, from which the same are supplied with water, the court would not be justified in issuing a perpetual injunction enjoining appellants from sinking their well, unless it was further conclusively established that by reason of the appellants' well coming in contact with the channel or artesian belt or basin, which supplied water to the Bower wells, it resulted in the permanent loss of water in the Bower wells, which water could not be replaced from the well of the appellants without permanent injury to respondents. The fact that the further sinking of appellants well would endanger the supply of water to respondents' well is not, in and of itself, sufficient to support the judgment. It must further appear that the sinking of appellants' well did not only endanger the loss of water in

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respondents' well, but that said loss would be actual and permanent and the water so lost could not be returned to respondents' irrigating system from the well of appellants. Should the flow of water in respondents' well be lessened by reason of the sinking of appellants' well, or should the inability of appellants to return to the irrigating system of respondents any loss in the water supply from the wells of respondents be established, the damages thus sustained could be speedily remedied by an order of the court directing that the well of appellants be permanently plugged or closed.

In our opinion the findings do not support the judgment. Therefore, in view of the conclusions reached by this court, it will be necessary to remand this case to the trial court with directions to suspend the perpetual injunction heretofore entered, and allow appellants to continue the sinking of the well situated upon said lot five, until it is conclusively established that respondents' well will sustain a permanent loss in the supply of water by reason of the construction or final completion of appellants' well; and that said loss of water cannot be returned to the diversion works of the respondents from the well of the appellants without material and permanent damage to the diversion works, and a surplus flow of water obtained for the use and benefit of the appellants. Should it later appear to the trial court that the flow of water in respondents' well is actually diminished by reason of the construction of appellants' well, and that said flow cannot be supplied from the well of the appellants, whereby respondents will suffer the permanent loss of the water heretofore appropriated and put to a beneficial use by them, said injunction should be restored and the well of the appellants permanently closed.

Each party to this suit shall pay its own costs.

Sullivan, C. J., and Morgan, J., concur.

Argument for Appellants.

(March 24, 1915.)

STATE, Respondent, v. EMMETT HOSFORD, EARL K. DODGE, WILLIAM PECK, JOSEPH McGOWAN and JOHN HODSON, Appellants.

[147 Pac. 286.]

APPEAL FROM POLICE COURT TO DISTRICT COURT—LOSS OF JURISDICTION
—WRIT OF REVIEW INEFFECTUAL.

1. Where certain persons were convicted of violation of the anti-gambling ordinance of a village before a justice of the peace acting as police magistrate of such village, and appealed from such judgment of conviction to the district court, such appeal being taken as prescribed by law, the jurisdiction of the justice of the peace acting as police magistrate ceased upon such appeal being perfected, and the jurisdiction of the district court attached.

2. Where a writ of review is issued by a district judge, directed to a justice of the peace acting as police magistrate, seeking to review a judgment of conviction in said police magistrate's court from which a valid appeal had already been taken to the district court, *held*, that the issuance of such writ was a futile thing, as the case was already pending in the district court for trial *de novo*, and the district court did not err in dismissing such writ of review.

APPEAL from the District Court of the Sixth Judicial District for Custer County. Hon. James M. Stevens, Judge.

Defendants found guilty of violating village anti-gambling ordinance in police magistrate's court. Appeal taken to district court and writ of review subsequently issued. From judgment of district court dismissing writ of review, defendants appeal. *Affirmed*.

L. E. Glennon and M. A. Brown, for Appellants.

There is no appeal provided from a justice court on questions of law; therefore, there is no appeal in this case. If we should appeal this case to the district court, the matter must be tried anew in such court. The questions involved would not be reviewed on an appeal, so that the appeal provided by

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the statute is inadequate, and, in fact, is no appeal at all on questions involved. The defendants were entitled to have these questions reviewed on an application for writ of review. (Sec. 8325, Rev. Codes; *Highway Commrs. v. Harper*, 38 Ill. 107; *Memphis & C. R. Co. v. Brannum*, 96 Ala. 461, 11 So. 468; *Abney v. Clark*, 87 Iowa, 727, 55 N. W. 6; *Coburn v. Mahaska Co.*, 4 Iowa, 242; *State v. Evans*, 13 Mont. 239, 33 Pac. 1010; *Paul v. Armstrong*, 1 Nev. 82; *Wiggins v. Henderson*, 22 Nev. 103, 36 Pac. 459; *People v. Stedman*, 57 Hun, 280, 10 N. Y. Supp. 787; *Union Steamboat Co. v. Buffalo*, 82 N. Y. 351.)

The court erred and exceeded its jurisdiction in refusing to grant a change of venue. (*Bell v. Bell*, 18 Ida. 636, 111 Pac. 1074; *Day v. Day*, 12 Ida. 556, 86 Pac. 531, 10 Ann. Cas. 260.)

The constitution of this state provides that trial by jury shall remain inviolate (art. 1, sec. 7), and the legislature has further provided that criminal cases in a justice court shall be tried before a jury, unless a jury be waived; and that in a police court a jury trial must be granted when demanded. (*Ex parte Wong You Ting*, 106 Cal. 296, 39 Pac. 627; *Ex parte Becknell*, 119 Cal. 496, 51 Pac. 692; *In re Fife*, 110 Cal. 8, 42 Pac. 299; *Ex parte Miller*, 82 Cal. 454, 22 Pac. 1113; *Powelson v. Lockwood*, 82 Cal. 613, 23 Pac. 143; *Taylor v. Reynolds*, 92 Cal. 573, 28 Pac. 688.)

Both of these rights are involved in this case, and the question can only be determined in the manner attempted by the defendants. In this case both questions go to the jurisdiction of the court, and therefore are proper matters to be reviewed by *certiorari* upon the showing made. The fact that defendants gave notice of appeal at the close of their pretended trial in the police court and failed to prosecute it is no ground of objection to granting of *certiorari* or writ of review. (*Poag v. Rowe*, 16 Tex. 590.)

The granting of a writ of review is discretionary, and even when there is an appeal, its allowance is not prohibited. (*People v. Donohue*, 15 Hun (N. Y.), 418.)

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J. H. Peterson, Atty. Genl., A. J. Higgins, County Atty., and W. W. Adamson, for Respondent.

Two things must be shown to exist before writ of review will be issued: First, that the tribunal has exceeded its jurisdiction, and, second, that there is no appeal. (*Canadian Bank of Commerce v. Wood*, 13 Ida. 794, 93 Pac. 257; *Gundersen v. District Court*, 14 Ida. 478, 94 Pac. 166.)

No writ lies from an order denying a change of venue. (*State v. Goode*, 4 Ida. 730, 44 Pac. 640.)

California held the same way, before their laws relating to appeals from justice courts were changed, and while their statute was the same as ours. (*Lowrey v. Hogue*, 85 Cal. 600, 24 Pac. 995; *Ex parte Wright*, 119 Cal. 401, 51 Pac. 639.)

The defendants having given notice of appeal from the decision and judgment of conviction and filed their stay bond on appeal to the district court before they made application for the writ of review, were therefore estopped from seeking further remedy by writ of review.

BUDGE, J.—This is a criminal action originally instituted before Joseph H. Horton, justice of the peace, sitting as police magistrate for the village of Challis. The defendants were charged with violation of the anti-gambling ordinance of said village. The cause came on regularly for hearing before said justice of the peace acting as police magistrate, December 12, 1913. The defendants appeared in person and by counsel. A demurrer to the complaint was interposed, and after argument, was by the court overruled. Defendants then moved for a change of venue, which motion was denied. Whereupon the defendants demanded a jury trial, which was by the court refused.

The court thereafter proceeded with the trial of said cause. Testimony on behalf of the state was introduced, after which counsel for the defendants interposed a motion to discharge the defendants upon the ground that the evidence was insufficient to sustain a conviction, which motion was overruled. The defendants refused to introduce any testimony. After

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argument by counsel for respective parties, the court found the defendants guilty of the offense as charged in the complaint, and imposed a fine upon each of them in the sum of \$25, and costs.

Immediately upon passing sentence, the attorney for the defendants gave notice of appeal from said judgment of conviction to the district court of the sixth judicial district for Custer county, Idaho. Said notice of appeal is dated December 12, 1913. On the same date a bond on appeal was given and approved.

On December 19, 1913, upon application of the defendants, a writ of review was issued by Hon. James M. Stevens, judge of the district court of the sixth judicial district of the state of Idaho. On January 20, 1914, a motion was duly made by W. W. Adamson, Esq., attorney for said city, to dismiss said writ upon the following grounds, to wit:

"1. That defendants have a plain, speedy and adequate remedy at law by appeal.

"2. That the court had jurisdiction of the subject matter of the suit and parties, and therefore jurisdiction to make and enter the orders sought to be reviewed.

"3. That the defendants having given notice of appeal from the decision and judgment of conviction entered in the police court and thereafter having filed a bond on appeal, that they are therefore estopped from seeking a further remedy by writ of review."

On January 28, 1914, said motion to dismiss the writ of review came on for hearing before said district judge, and after argument by counsel for respective parties, the motion to dismiss said writ was granted. Thereupon a notice of appeal to the supreme court from the order of the district court dismissing said writ of review was filed and served.

This appeal is from the judgment of the district court dismissing the writ of review.

It will be observed that on December 12, 1913, defendants gave notice of appeal to the district court of the sixth judicial district for Custer county and on the same date furnished a good and sufficient bond on appeal. Sec. 8320, Rev. Codes,

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provides for an appeal to the district court "from any judgment of conviction rendered in a criminal action by . . . justice's court." Sec. 8321, Rev. Codes, provides for the giving of a proper notice of appeal. Sec. 8324, Rev. Codes, provides: "The party appealing may, . . . if he desires to be released from custody during the pendency of the appeal, or desires a stay of proceedings under the judgment until the appeal be disposed of, enter into a recognizance . . . and that he will faithfully prosecute the same and render himself in execution of any judgment . . ." Sec. 8323, Rev. Codes, provides: "When an appeal is taken, the . . . justice must immediately transmit to the clerk of the district court of the county, the complaint, notice of appeal, . . . and any recognizance entered into by the defendant . . ." Sec. 2216, Rev. Codes, provides: "Appeals may be taken from the judgments of the police judge, in the same manner as appeals are taken from the judgments of justices of the peace in criminal cases."

The appeal, therefore, having been properly taken by the defendants, as provided by the various sections of the statutes cited, the jurisdiction of the justice acting as a police magistrate ceased and the jurisdiction of the district court attached. The cause having been transferred, by the act of the defendants, from the magistrate's court to the district court, there was nothing to review, and the issuance of the writ of review on December 19, 1913, was a futile and idle act. Upon the giving of notice of appeal, it became the duty of said justice of the peace to immediately transmit to the clerk of the district court the files, etc., in the case. The magistrate's court had lost jurisdiction and the case was then pending in the district court for trial *de novo*.

We have therefore reached the conclusion that the district court did not err in dismissing said writ of review. The judgment of the district court is *affirmed*.

Sullivan, C. J., and Morgan, J., concur.

Argument for Respondent.

(March 31, 1915.)

W. W. ADAMSON, Respondent, v. BOARD OF COUNTY COMMISSIONERS OF CUSTER COUNTY, Appellant.

[147 Pac. 785.]

CRIMINAL LAW—APPOINTMENT OF SPECIAL PROSECUTOR—AUTHORITY OF DISTRICT COURT—CONSTRUCTION OF STATUTES.

1. Under the provisions of sec. 2081, Rev. Codes, when the prosecuting attorney is disqualified as provided by said section, the district court is given authority to appoint a person to prosecute any criminal case pending in the district court, and the person so appointed is required to prosecute such case.

2. The law provides for a prosecuting attorney in each county, and it is made his duty to prosecute all criminal cases except such as he is disqualified under the law to prosecute.

3. County commissioners are not authorized under the law to employ counsel to assist the prosecuting attorney in prosecuting criminal cases.

4. *Held*, under the facts of this case that the respondent was a suitable person to be appointed by the district court to prosecute the criminal case referred to in the record.

APPEAL from the District Court of the Sixth Judicial District for Custer County. Hon. James M. Stevens, Judge.

Appeal from the board of county commissioners disallowing a part of a claim for prosecuting a criminal case by a special prosecutor appointed by the district court. Judgment for plaintiff. *Affirmed*.

J. H. Peterson, Attorney General, and A. J. Higgins, Prosecuting Attorney of Custer County, for Appellant, cite no authorities.

W. W. Adamson, for Respondent.

A special prosecutor has all the powers of a regular prosecuting attorney in the prosecution of the particular case he is appointed for, but he is not a prosecuting attorney in the

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sense that the term is used in sec. 2084, which only refers to prosecuting attorneys who are elected to fill that office, which is created the same as any other county or state office under our laws. (*State v. Corcoran*, 7 Ida. 220, 61 Pac. 1034.)

PER CURIAM.—This is an appeal from the judgment of the district court modifying an order of the board of county commissioners of Custer county, and entering judgment in favor of the respondent in the sum of \$300.

It appears from the record that a certain criminal case was pending in said court, in which the prosecuting attorney of Custer county was disqualified, and the court appointed the respondent as special prosecutor in said criminal case, under the provisions of sec. 2081, Rev. Codes.

Under the statutes of this state and the provisions of said sec. 2081, when the prosecuting attorney is disqualified as provided by said section, the district court is given the authority to appoint a person to prosecute any criminal case pending in the district court. Under the law it is made the duty of the prosecuting attorney of the county to prosecute all criminal cases in which he is not disqualified. A practice has grown up in some of the counties of the state whereby the board of county commissioners employ counsel at the expense of the county to assist the prosecuting attorney in the prosecution of criminal cases. A board of county commissioners has no such authority under the constitution or the law. (*Conger v. Commrs. of Latah County*, 5 Ida. 347, 48 Pac. 1064.) In that case, in Judge Quarles' concurring opinion, it is held as follows:

"The law provides a prosecuting attorney. In case of his absence or inability to act, the law has made it the duty of the district court to appoint a proper person to perform the duties of such district attorney. . . . The control of criminal prosecutions is vested in the public prosecutor and the district court and the county commissioners cannot by themselves or by hired counsel take charge of such prosecution either in whole or in part. The people select their prosecuting attorneys, and it is not the province of the board of county

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commissioners to say that he is incompetent and therefore they will employ counsel to discharge his duties."

The rule laid down there was the law then and it has not since been changed by statute or decisions of this court.

Said sec. 2081 is as follows:

"When there is no prosecuting attorney for the county, or when he is absent from the court, or when he has acted as counsel or attorney for a party accused in relation to the matter of which the accused stands charged, and for which he is to be tried on a criminal charge, or when he is near of kin to the party to be tried on a criminal charge, or when he is unable to attend to his duties, the district court may, by an order entered in its minutes stating the cause therefor, appoint some suitable person to perform for the time being, or for the trial of such accused person, the duties of such prosecuting attorney, and the person so appointed has all the powers of the prosecuting attorney, while so acting as such."

Under the provisions of said section the district court is authorized and required to appoint a special prosecutor where the prosecuting attorney is disqualified by the provisions of said section. The district court is authorized to appoint a suitable person as special prosecutor, but it is contended that the respondent is not a suitable person for the reason that he was disqualified from acting by the provisions of sec. 2084, Rev. Codes, on the ground that the respondent was attorney in a civil case in which the defendant in the criminal case and several others were defendants, which civil case was dependent upon some or all of the facts on which this prosecution depended.

Said sec. 2084 is applicable to prosecuting attorneys regularly elected or appointed, and the respondent was not a prosecuting attorney in the sense in which that term is used in said sec. 2084. (See *State v. Corcoran*, 7 Ida. 220, 61 Pac. 1034.) There is nothing in the record to show that respondent instituted that prosecution or solicited the appointment as special prosecutor. He accepted such appointment only as a duty he owed to the state and the court that appointed him,

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and was obliged to act. There is nothing in this contention of appellant.

This court is not called upon to pass upon the question whether even under the provisions of said sec. 2081 the respondent under said appointment was entitled to receive compensation for the services rendered in the prosecution of said case, and we do not decide that question.

The judgment is affirmed, with costs in favor of the respondent.

(April 12, 1915.)

CALEB BRINTON, Attorney in Fact of THOMAS W. JONES, Appellant, v. WESLEY STEELE and N. M. BEGGEMAN, Respondents.

[147 Pac. 1062.]

DISPUTED LOT LINE—FORMER HEARING—PURPOSE FOR WHICH REMANDED
—ESTABLISHMENT OF PERMANENT MONUMENTS.

1. *Held*, that upon a former hearing this case was remanded to the trial court in order that "permanent and lasting monuments" might be established upon the dividing line between the lots in controversy, in accordance with the findings and decree of the trial court, and not for the purpose of making any change in such line, as found by the trial court to be the true line between said lots.

APPEAL from the District Court of the Second Judicial District, in and for Nez Perce County. Hon. Edgar C. Steele, Judge.

Action to permanently fix boundary line. Judgment for respondent. *Affirmed*.

Ben F. Tweedy, for Appellant.

George W. Tannahill, for Respondents.

Counsel cite no authorities on point decided.

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BUDGE, J.—This action has been three times before this court (*Brinton v. Steele*, 19 Ida. 71, 112 Pac. 319, 23 Ida. 615, 131 Pac. 662, 25 Ida. 783, 140 Pac. 113), and is again before this court upon appeal from a judgment in favor of respondent.

This court, speaking through the late Justice George H. Stewart, in rendering its opinion, found in 23 Ida. 615, 131 Pac. 662, affirmed the judgment of the trial court, but for the purpose, as clearly appears from the opinion when considered as a whole, of permanently establishing the boundary line upon the ground between lots 12 and 13, block 30 of the city of Lewiston, owned by the appellant and respondent respectively, made the following statement: "From the finding it is apparent that the dividing line between lots 12 and 13 is and should be fixed from the survey made by Briggs and Maxon by making proper apportionment of excess land in the southern ends of lots 12 and 13, and that being true, the true line between the two lots should be established and identified by a clear description in the findings and decree and also upon the ground by proper monuments." The proper apportionment had already been made by Briggs and Maxon, whose survey of the boundary line between said lots 12 and 13 had by the trial court in its findings and decree been adopted as the true line, which findings by the trial court and the decree based thereon were found by this court to be sufficient, but not certain and specific as to the location of the true boundary line upon the ground between said lots 12 and 13, and for the purpose of establishing permanently the true boundary line upon the ground between said lots 12 and 13, and that the said boundary line might be more fully identified by the findings, this court directed that the true line between said lots should be marked by placing proper and lasting monuments along said line, and that said lasting monuments be described in the findings of the court, in order that the parties to this action at any future time might be able to identify the correct dividing line between said lots 12 and 13 by reference to the findings of the trial court and by the permanent monuments.

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While it is true that the language used in this connection in the opinion, as well as the language used in remanding the cause for further proceedings, is unfortunate by reason of the use of the word "reversed" instead of the word "remanded," from a consideration of the entire opinion, it is quite clear to us the court reached the conclusion that the permanency of the line established between said lots depended upon the existence of a line of trees dividing said lots, and in time these trees would disappear, which, in all probability, would result in the contention between the parties to this action over the correct line being renewed. Therefore, in order to avoid such a contingency, this court directed that "proper monuments" be erected along the line theretofore established by the survey of Briggs and Maxon, which line had been previously adopted by the trial court as the correct dividing line. The concluding portion of the opinion was no doubt confusing to the trial judge. This is evident from the fact that after the cause was remanded, considerable time elapsed before the directions of this court were complied with, and resulted in the issuance of an alternative writ of *mandamus* directed against the trial judge for failure to comply with the judgment and order of this court. See *Brinton v. Steele*, 25 Ida. 783, 140 Pac. 113, where this court made the following order:

"The [trial] court should direct the surveyor, whose survey has been adopted and which he proposes to follow in this case, to go upon the ground and there establish permanent and lasting monuments, and these should be referred to in the findings and decree so definitely and certainly as to leave no doubt as to the exact points through which this dividing line runs. Evidently the trial court means to find that the dividing line between these adjoining properties runs through the center of this row of trees. These trees are now old and decaying and will doubtless be removed from the ground in a very few years, and a decree referring to them will then be as uncertain and indefinite as has been the line during the past. It will then take extraneous and oral evidence to prove the location of this line."

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It is clear that the intention of this court, in view of the fact that the trial court had not caused to be erected "permanent and lasting monuments" along the correct line as established by Briggs and Maxon, and failed to refer to said permanent and lasting monuments in its findings of fact, which findings and decree in this respect were not specific and certain, was merely to direct that this be done; remanding the case for that purpose only, and not for the purpose of making any changes in the line as established by Briggs and Maxon or causing the line to be changed or run in any other or different course than that found by the trial court to be the true line according to the above-mentioned survey.

The trial court, in compliance with the order above mentioned, directed Edson D. Briggs, one of the surveyors whose survey was adopted by the court, to go upon the ground and establish permanent and lasting monuments on the dividing line between lots 12 and 13, block 30, and to report the same to the court. Thereafter, in pursuance to the order of the court, Briggs rechecked the line theretofore established by himself and Maxon and made his report, which in part is as follows:

"I further certify that having been requested to locate said line dividing lots 12 and 13, of block 30, with reference to the row of poplar trees referred to in the above-entitled action, I retraced the said line dividing said lots 12 and 13, of block 30, to note its relation to said trees, and for the information of the above-entitled court and the said parties to said action, I beg to report as follows:

"Starting from the said undisputed point of northwest corner of lot 13, block 30, thence south 29 degrees, 01 minutes west, upon said line 897 feet in length to the southwest corner of point of lot 13, block 30, a brick building is constructed on the northeast corner of said lot 12, block 30, which entirely covers the stump of the tree which, if still standing, would be the first tree of said row.

"The said line intersects the first tree of said row now standing at a point 80.2 feet from said monument at north-

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west corner of lot 13, block 30, said line passing directly through the center of said first tree.

“The said line intersects the second tree now standing of said row at a point 98.2 feet from said monument at north-west corner of lot 13, block 30, said line passing a little to the west of the center of said second tree, which has grown toward the east.

“The said line intersects the third tree now standing of said row at a point 116 feet from said monument at north-west corner of lot 13, block 30, and passes through the present center of said third tree.

“The said line intersects the fourth tree of said row now standing and passes through the eastern half of said fourth tree, which has grown toward the west; and adjacent to said tree, on said line, I set a monument which is 282.6 feet from said monument at northwest corner of lot 13, block 30, consisting of three-fourths inch galvanized gas-pipe.

“There was also a tree between the third and fourth trees herein referred to, which has been removed, but said line intersects the center of the stump of said tree, and that all of said trees are about three and one-half feet in diameter.

“That to further establish and identify the said line I also installed two additional monuments as follows:”

By referring to the findings, it will be seen that the court adopted the report of the surveyor, re-establishing the true line between said lots and placing permanent and lasting monuments along this line upon the ground.

While it is true, as contended by counsel for appellant, that the language this court used in its opinion (25 Ida. 786, 140 Pac. 113), is to the effect that the line should be fixed and established “through the center of this row of trees,” it is clear that the court intended to hold that the original survey should be permanently established, not necessarily through the center of each and every poplar tree, but without regard to whether or not the line ran through the center of each and every poplar tree. The true line had been fixed by the Briggs and Maxon survey and the proper apportionments made. Therefore there was no necessity for making other or

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different apportionments, and it was never intended that the apportionments theretofore made should be in any manner disturbed, or that the true and correct line should be changed. But it was intended that the true and correct line should be permanently established by the placing of lasting and permanent monuments along the line between said lots 12 and 13, and that the court should refer to said fixed and lasting monuments in its findings of fact. Counsel for appellant contends, by reason of the fact that this court unfortunately used language which might be construed to mean that the line must be established through the center of the row of poplar trees, that irrespective of where the true and correct line was, it was nevertheless the imperative duty of the trial court to disregard the true line and run a line through the center of each and every tree. The least deviation from the center of any of said row of poplar trees would be in violation of the order of the court. With this contention we are not in accord. We are satisfied from a careful consideration of this entire litigation that the only intention or purpose of this court was to have established between said lots 12 and 13 permanent and lasting monuments along the correct line, in order to avoid any further litigation. When this was done, the order of this court had been fully complied with.

The closing part of the opinion reads as follows: "The judgment is reversed [remanded], and the trial court is directed to proceed and carry out the views expressed by this court and incorporate in the findings and decree the suggestions and directions of this opinion." This court did not order a new trial or direct that additional testimony be submitted.

Counsel for appellant does not contend that the surveyor did not fix the monuments upon the line adopted by the trial court as being the correct line based upon the Briggs and Maxon survey, but rather contends that the original survey made by Briggs and Maxon was not correct. The trial court having passed upon that question and this court having affirmed the trial court, there was nothing for the trial court to do but to establish the permanent and lasting monuments

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along the line located upon the ground by Briggs and Maxon. Counsel did not offer to show that this line was not re-established and the permanent and lasting monuments placed upon the correct line surveyed by Briggs and Maxon.

We have therefore concluded that the trial court did not err in entering up judgment in this cause in favor of the respondent. The judgment is sustained with costs to respondent.

Sullivan, C. J., and Morgan, J., concur.

Petition for rehearing denied.

(April 13, 1915.)

FIRST NATIONAL BANK OF IOWA CITY, IOWA, a Corporation, Appellant, v. R. M. WALKER, Respondent.

[148 Pac. 46.]

NATIONAL BANKS—CORPORATE EXISTENCE—ALLEGATION OF—DENIAL ON INFORMATION AND BELIEF—MATTERS OF PUBLIC RECORD—PROOF OF INCORPORATION.

1. Where the corporate existence of a national bank, which is plaintiff in an action, is alleged in the complaint and denied on information and belief in the answer, such denial is not sufficient to put in issue such allegation, since the corporate existence of national banks is a matter of public record.

2. A denial on information and belief of matters of public record is no denial, and does not put in issue the fact alleged in the complaint which it attempts to deny.

3. *Held*, that the court erred in holding that the corporate existence of a national bank could be proved only by its articles of incorporation.

4. Courts will take judicial notice of the general laws of the United States in regard to the incorporation of national banks, which laws indicate that such banks are to be regarded as public institutions, and such banks, when parties to a suit, may prove by parol that they were carrying on a general banking business authorized by the general laws of the United States.

Argument for Respondent.

APPEAL from the District Court of the Second Judicial District for Latah County. Hon. Edgar C. Steele, Judge.

Action to recover on promissory note. Judgment for defendant. *Reversed.*

Peterson & Peterson, for Appellant.

A denial on information and belief of matters of public record is no denial, and does not put appellant upon its proof as to its corporate existence. (*Simpson v. Remington*, 6 Ida. 681, 59 Pac. 360; *Bennett Co. v. Twin Falls Land Co.*, 14 Ida. 5, 38, 93 Pac. 789; *Work Bros. v. Kinney*, 7 Ida. 460, 63 Pac. 596; *Vadney v. State Board of Medical Examiners*, 19 Ida. 203, 112 Pac. 1046; *Northwestern Cordage v. Galbraith*, 9 S. D. 634, 70 N. W. 1048; *Society for the Propagation of the Gospel v. Town of Pawlett*, 4 Pet. 480, 7 L. ed. 927; *Conard v. Atlantic Ins. Co.*, 1 Pet. 395, 7 L. ed. 189; *Brady v. National Supply Co.*, 64 Ohio, 267, 83 Am. St. 753, 60 N. E. 218; *Mulcahy v. Buckley*, 100 Cal. 484, 35 Pac. 144; *Mullally v. Townsend*, 119 Cal. 47, 50 Pac. 1066; *Sumpter v. Burnham*, 51 Wash. 599, 99 Pac. 752; *Oakes v. Ziemer*, 61 Neb. 6, 84 N. W. 409; *City of New York v. Matthews*, 180 N. Y. 41, 72 N. E. 629.) Courts should take judicial notice of the corporate existence of national banks. (*Yakima National Bank v. Knipe*, 6 Wash. 348, 33 Pac. 834; *McKiel v. Real Estate Bank*, 4 Ark. 592.)

G. W. Suppiger, for Respondent.

The general rule in civil actions by or against corporations is, that when it becomes necessary to establish corporate existence, the best evidence of the fact is the original articles or certificate of association or incorporation, or a duly authenticated copy thereof. (3 Ency. of Evidence, 602.)

At the trial, the denial by defendant of the corporate existence of the plaintiff was considered by court and counsel for plaintiff as sufficient, and plaintiff attempted to prove such existence. The court's attention was not called to the fact that such denial was on information and belief, and

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appellant should not be allowed to raise such objection on appeal. (*Nobach v. Scott*, 20 Ida. 558.)

"If upon trial a question is asked, to which objection is made and sustained by the court, and the plaintiff does not prove or offer to prove the other facts necessary to entitle the plaintiff to recover, the ruling of the trial court is not prejudicial." (*Sponberg v. First Nat. Bank of Montpelier*, 15 Ida. 671, 99 Pac. 712.)

"And if such ruling was not prejudicial to the plaintiff the judgment should not be reversed." (Rev. Codes, sec. 4231; *Barns v. Pitts Agricultural Works*, 6 Ida. 259, 55 Pac. 237; *Smith v. Ellis*, 7 Ida. 196, 61 Pac. 695; *McCrea v. McGrew*, 9 Ida. 382, 75 Pac. 67; *Harpold v. Doyle*, 16 Ida. 671, 102 Pac. 158; *Rowley v. Stack-Gibbs Lumber Co.*, 19 Ida. 107, 112 Pac. 1041.)

"Where there is no evidence to establish the material issues of the complaint, the court on motion of the defendant ought to instruct the jury to return a verdict for the defendant." (*Haner v. Northern Pac. Ry. Co.*, 7 Ida. 305, 62 Pac. 1028; *Smalley v. Rio Grande Western Ry. Co.*, 34 Utah, 423, 98 Pac. 311.)

SULLIVAN, C. J.—This action was brought to enforce the payment of a promissory note alleged to have been executed by the defendant, who is respondent here, in favor of the Brenard Manufacturing Company for the sum of \$587, payable in four instalments.

It is alleged in the complaint that said promissory note was transferred to the plaintiff by the Brenard Manufacturing Company before its maturity and for a valuable consideration. The complaint also alleges the corporate existence of the plaintiff as a national bank under the banking laws of the United States. The answer of the respondent denies the corporate existence of the appellant bank on information and belief; denies that it executed the promissory note sued on; denies that the plaintiff is the legal holder and owner of said note, and sets up as a separate defense matter that is not

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important in the decision of this case, which separate defense was denied by the plaintiff.

The cause came on for trial before the court with a jury, and when the plaintiff undertook to prove its corporate existence as a national bank by the testimony of the cashier of such bank, objection was made by counsel for the respondent to such testimony on the ground that it was leading and suggestive and calling for the conclusion of the witness and was not the best evidence; and in ruling upon said objection the court said: "I will sustain the objection. You have to bring the articles here" [meaning the articles of incorporation]. Counsel for the plaintiff then proceeded to read further from the deposition of said cashier as follows: "State whether or not you are connected with the First National Bank of Iowa City, and if so, state in what capacity." Counsel for respondent thereupon objected to said interrogatory and the answer thereto as being incompetent, irrelevant and immaterial, since it had not been proved that there was such a corporation as the plaintiff. The court thereupon said: "This is not proof there is such an incorporation; they might as well quit, unless they prove the incorporation of that bank. You can read the answer to the question but there is no use to go further with this case unless you have the proof of this corporation." Appellant's counsel thereupon stated that they had no further proof that it was a corporation. The court thereupon said: "You ought to have articles of incorporation. They ought to have known enough to send them to you if the bank is an incorporation; you have to prove it, when they deny it, with the articles of incorporation; you can't prove it in any other way."

After further reading from the direct examination of said witness in said deposition, counsel for respondent thereupon inquired of counsel for appellant whether he was not going on to read the cross-examination of said cashier as contained in that deposition and counsel responded that the cross-examination was that of the defendant, and counsel for the defendant responded that he didn't want to take up any time in reading said cross-examination. The court thereupon stated as fol-

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lows: "Nothing for me to do. You are taking up the time of the court, no question, they are taking up the time of the court, unless they can prove the incorporation, and they say they can't prove it; seems like folly to run longer here, but I have not got to the stopping point until they rest, and you make a motion." Thereupon some of the cross-examination of said witness was read from said deposition. Thereafter counsel for appellant stated: "In view of the fact that we have no proof of this being a corporation, it is useless to go on. No use to call an expert on handwriting, unless we can get them to agree to this incorporation." The court: "You will have to go on or rest, before I can do anything, and if they introduce no testimony, I can dispose of this case pretty quick. I can't ask them to admit it was a corporation; they can do as they please about it. Any further evidence on the part of the plaintiff?" Counsel replied that there was none and counsel for defendant announced that the defendant rested. The court thereupon said: "Prepare me a formal verdict in favor of the defendant. Mr. Headley, I will appoint you foreman of this jury. Gentlemen of the jury, these mistrials sometimes occur, as it has occurred in this case. It is not the fault of the attorneys. These people, when they were asking about the incorporation, ought to have sent them their articles, and it seems to me the banks ought to know enough to know they have to supply their attorneys with these things. In this case, gentlemen of the jury, the court instructs you that you should find for the defendant, the reason being that the plaintiff has not sustained its allegations of the complaint. Pass this to Mr. Headley and give him a pen and ink, and I will not send the jury out. The record will show exceptions."

Thereupon judgment was entered in favor of the defendant and motion for a new trial was denied. The appeal is from the judgment and the order denying a new trial.

Several errors are assigned, but in our view of the matter it will only be necessary for us to pass upon the one assignment, which is to the effect that the court erred in requiring the plaintiff to prove its existence by its articles of incorpora-

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tion or by any other evidence, since the corporate existence of said national bank was denied only upon information and belief.

The corporate existence of a national bank is a matter of public record, and under a long line of decisions from this and other courts, a denial on information and belief of matters of public record is not a sufficient denial under our statute. (*Simpson v. Remington*, 6 Ida. 681, 59 Pac. 360; *Bennett Co. v. Twin Falls Land Co.*, 14 Ida. 5, 93 Pac. 789; *Work Bros. v. Kinney*, 7 Ida. 460, 63 Pac. 596; *Vadney v. State Board of Medical Examiners*, 19 Ida. 203, 112 Pac. 1046; *Northwestern Cordage Co. v. Galbraith*, 9 S. D. 634, 70 N. W. 1048; *City of New York v. Matthews*, 180 N. Y. 41, 72 N. E. 629.)

The court at almost the very outset of the trial stated that the corporate existence of the plaintiff must be proved by the articles of incorporation, and said: "You can't prove it in any other way," and that they were taking up the time of the court unless they could prove the incorporation in that way. It was therefore useless for the respondent to proceed any further, since the court looked upon the question of the incorporation of said bank as a material issue in the case. That denial on information and belief was not sufficient to put in issue the corporate existence of said bank, and the court erred in so holding.

In *Yakima National Bank v. Knipe*, 6 Wash. 348, 33 Pac. 834, the court held that in an action by a national bank as plaintiff, it may prove that it is an incorporation *de facto* by parol evidence, that it is carrying on a general banking business as a national bank authorized by the general laws of the United States under the name under which it had sued, and the court will take judicial notice of the laws of the United States in regard to such banks.

It was held in *United States v. Williams*, 4 Biss. (U. S. Dist. Court of Ind.), 302, Fed. Cas. No. 16,706, that the various and numerous provisions of the act providing for the incorporation of banks indicate that they are to be regarded

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as public institutions, the existence of which all of the departments of government must officially take notice.

The trial court clearly erred in holding that the existence of the plaintiff as a national bank was put in issue by a denial thereof on information and belief, and that the incorporation of such bank could be proved only by the articles of incorporation themselves, and in holding that there was no need to proceed any further with the case until the incorporation of the plaintiff was proved. Under the ruling of the court, it would have been of no use whatever for the plaintiff to introduce or offer to introduce any further evidence to prove the issues made by the pleadings.

Several other errors are assigned which it will not be necessary for us to pass upon in this opinion, since those questions will not arise on a retrial of the case.

The judgment must be reversed and a new trial granted and the cause remanded for further proceedings. Costs are awarded to the appellant.

Budge and Morgan JJ., concur.

(April 14, 1915.)

MAYNARD BROWN, Respondent, v. CELIA A. BROWN,
Appellant.

[148 Pac. 45.]

ADULTERY—FINDINGS—SUFFICIENCY OF EVIDENCE.

1. Where a decree of divorce is granted on the ground of adultery, the evidence ought to be clear and conclusive of that offense.
2. The evidence held not sufficient to support the findings of the trial court.

APPEAL from the District Court of the Second Judicial District for Clearwater County. Hon. Edgar C. Steele, Judge.

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Action to procure a divorce. Judgment for plaintiff. *Reversed.*

Edward Hofstede, for Appellant.

The proof of adultery as a ground for divorce must be clear and positive. (*Berckmans v. Berckmans*, 17 N. J. Eq. 453; *Gibson v. Gibson*, 18 App. Cas. (D. C.) 72; *Moller v. Moller*, 115 N. Y. 466, 22 N. E. 169.)

Testimony that adultery was committed without evidence as to the facts upon which the conclusion is based is insufficient. (*Herrick v. Herrick*, 31 Mich. 298.)

If, after careful consideration, the evidence of guilt is inconclusive, a divorce will be denied. (*Haggard v. Haggard*, 62 Iowa, 82, 17 N. W. 178 [boastful admission by defendant and testimony by hostile witness]; *Scheffling v. Scheffling*, 44 N. J. Eq. 438, 15 Atl. 577 [uncorroborated and improbable evidence of a single witness]).

An adulterous disposition is not necessarily shown by the existence of a state of undue familiarity between the parties accused (*Pollock v. Pollock*, 71 N. Y. 137), and in the absence of evidence of an adulterous inclination, proof of opportunity alone does not establish adultery. (*Osborn v. Osborn*, 44 N. J. Eq. 257, 9 Atl. 698, 10 Atl. 107, 14 Atl. 217.)

John R. Becker, for Respondent.

The appellant's case under her cross-complaint is not sufficient as a defense and bar to respondent's right to a decree unless she has made out a case which would entitle her to a decree against her husband if the charge of adultery on her part had not been alleged or proved. (Sec. 2656, Rev. Codes; *Stoneburner v. Stoneburner*, 11 Ida. 603, 83 Pac. 938; *Conant v. Conant*, 10 Cal. 249, 70 Am. Dec. 717.)

SULLIVAN, C. J.—This action was brought to procure a divorce on the ground of adultery, for the care and custody of three minor children, and for the distribution of certain property belonging to the plaintiff and defendant.

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The defendant answered, denying some of the material allegations of the complaint, and by way of cross-complaint demanded a divorce from the plaintiff on the ground of cruel and inhuman treatment. The cross-complaint was answered by the plaintiff and the cruel and inhuman treatment charged in the cross-complaint denied.

Upon the issues thus made the cause was tried and finding of facts and decree and judgment entered in favor of the plaintiff, granting him a divorce on the ground of adultery and awarding the youngest child to the mother and the other two to the mother of the plaintiff, and making a distribution of the property belonging to the parties. The appeal is from the judgment.

Several errors are assigned, to the effect that the evidence is insufficient to sustain the findings; that the finding made on the issues raised on the cross-complaint is not sufficient; that the court erred in awarding certain property to the plaintiff and in awarding the custody of the two older minor children to the mother of the plaintiff, and in not requiring the plaintiff to pay the attorney's fees of the defendant, and that the court erred in admitting and excluding certain evidence.

It is first contended that the evidence is not sufficient to support the findings of the court whereby the court found the defendant guilty of adultery. The court found that one act of adultery was committed with one Snodgrass, now deceased, on or about the first day of November, 1912. The court also found that on divers other days and times between the 1st of November, 1912, and the 25th of February, 1914, the defendant committed adultery with said Snodgrass at and in the vicinity of the residence of plaintiff near the village of Orofino.

The record shows that said Snodgrass had boarded in the family of the plaintiff and defendant for three months or more and was a very frequent visitor at their home; that the plaintiff's mother had lived in the family and was a frequent visitor there; also one of the principal witnesses for the defendant, a Mrs. Mary Norris, had boarded for about three

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months in the Brown family, she being the only witness who testified to having seen any act of sexual intercourse between the defendant and said Snodgrass. On her cross-examination she admitted that she did not see them having sexual intercourse, but the defendant was sitting straddle of his lap; that she did not see them in the act; that although she had boarded there for three months or more, she never saw any other act that led her to believe that they were guilty of the act charged, but she thought they were a little too familiar in the way they talked, but did not remember any of the conversation or conversations that suggested familiarity; that she never "came right out and told anybody" of said compromising position she claimed to have seen them in, although she remained at the residence of Brown for some weeks after she claimed to have seen said act of intimacy.

The record shows that this witness had a grudge against the appellant, and that she had said she intended "to get even" with her. The appellant denied ever having sexual intercourse with Snodgrass and also testified that she had a conversation with the witness, Mary Norris, and testified in regard to such conversation as follows: "Well, I asked her, I says, 'Mamie'—she had talked before and said she would get even—'now,' I says, 'I would like to know what you are going up there and tell and hurt me, if you tell the truth, for,' I says, 'you know you can't tell anything to hurt me, and tell the truth.' She says, 'I don't care a damn; I can get even with you. If I don't, I will get paid for it; there is money in it anyway.'"

This witness, Mary Norris, it appears, testified on the criminal trial in which the respondent was prosecuted for the murder of Snodgrass, to some things damaging to the character of the appellant. The plaintiff himself testified that he knew of no acts of sexual intercourse between the appellant and Snodgrass. The mother of the plaintiff, who lived in the family for some time, testified she thought Snodgrass too familiar in the Brown home, but did not testify that she knew of any acts of sexual intercourse between them. The fact is clearly shown by the record that no act of sexual intercourse

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was testified to against the defendant aside from the testimony of Mary Norris, and on cross-examination her testimony shows that she saw the defendant in a compromising position with Snodgrass (which was contradicted by the appellant), and her testimony, taken as a whole, is of a very suspicious character, since it is shown that she was bitterly prejudiced against the appellant.

The evidence shows that Snodgrass was a frequent and welcome visitor at the Brown home, and the plaintiff himself testified that he had observed no acts of undue familiarity between his wife and the said Snodgrass, but that he had heard things from others that had led him to believe that there was too much familiarity between them.

It was sought to be shown that at the time the plaintiff killed Snodgrass appellant had gone over the river to meet him, but the evidence clearly shows that she went over to meet her husband as well as Snodgrass, since she knew that her husband was in Orofino and would shortly return home. The husband had intended to go to Kamiah the morning of the day of the killing, but did not go, and the son of plaintiff and defendant returned from school about 5 o'clock on the evening of the day of the killing and informed the appellant that he had seen his father in town after the train had gone to Kamiah. On that point the appellant testified as follows:

"Yes. He told me that morning that he was going to Kamiah that evening; he told me two or three days before he was going, and he said he didn't like to go; he would like to get someone else to go in his place; he said he didn't like to go himself, and he said, 'I wonder if I couldn't get Jim to go and take my place'; he says, 'I am going to ask him if he won't go up in my place,' and he didn't go. I don't know whether he asked Snodgrass or not, but he told me he was going to, but he told me that morning—he came over town and said he was going to Kamiah. I says, 'You will be back for dinner, then'; he says, 'I don't know whether I will or not.' I says, 'Will you call me up before you go, if you leave?' And he says, 'Yes, I will,' and he never came back,

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and Norman came home about 5 from school, and he says, 'I seen Dad over town and the train was gone,' and I knew he hadn't gone to Kamiah."

The appellant also explained that she often crossed the river to meet her husband, and since she knew he was in town she expected him home that evening. She also knew that Snodgrass intended to come over that evening, and she crossed the river and started down toward town to meet them, and her husband appeared in a disguise and knocked her down and beat her and gagged her. Shortly afterward Snodgrass came along and he shot him with a load of "double B" shot, from the effects of which Snodgrass shortly died.

The impression intended to be conveyed by the plaintiff was that his wife had crossed the river to meet Snodgrass, but the record shows that she knew her husband was in Orofino, which was a mile from their residence, and would in all probability be home that evening.

Since a new trial must be granted, we will not go any further into the evidence, but it is sufficient to say that acts and circumstances which have been shown by the plaintiff in support of the allegations of the complaint are not sufficient to support the findings of the trial court. The third finding is to the effect that the defendant committed adultery with one Snodgrass on or about the first day of November, 1912. This is based on the testimony of Mary Norris, which testimony, taken in connection with other testimony, is not sufficient to support that finding. The fourth finding of fact is that on divers and other days and times between the first day of November, 1912, and the 25th of February, 1914, the said defendant committed adultery with said Snodgrass at and in the vicinity of the residence of the plaintiff and defendant near the village of Orofino. There is absolutely no evidence in the record to support that finding.

In cases of this character, where the mother of a family of children is charged with the offense with which this defendant is charged, before blighting her life and the lives of her children, the evidence ought to be clear and conclusive, and the defendant should not be found guilty of such an

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offense upon mere suspicion and conjecture. The lives and character of the children are of great moment and importance, not only to themselves, but to the state, and a child should not be branded by a decision such as we have in this case unless the evidence is clear and very conclusive, for human nature is so constituted that these children would be recognized and pointed out by their associates and people among whom they live as children of an adulterous mother; and the mother must continue, if this judgment is permitted to stand, with the reputation of being an adulteress, and will be scorned and shunned by many who would no doubt otherwise be of a friendly disposition toward her. It is a matter of public policy, also, that divorces, especially on the ground of adultery, should be granted only upon very clear and conclusive evidence.

We conclude that the evidence is not sufficient to support the findings, and that the judgment must be set aside and a new trial granted. Costs awarded to appellant.

Budge, J., concurs.

Morgan, J., did not sit at the hearing and took no part in the decision of this case.

(April 19, 1915.)

STATE BANK OF CLARKSTON, a Corporation, Respondent, v. JAKE G. WATSON et al., Appellants.

[148 Pac. 470.]

NOTICE OF APPEAL—SERVICE OF—ADVERSE PARTIES.

1. Under the provisions of sec. 4808, Rev. Codes, the notice of appeal must be served upon every party to the action not appealing whose interests might be affected by the reversal or modification of the judgment, irrespective of whether they are plaintiffs, defendants or intervenors.

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APPEAL from the District Court of the Second Judicial District, in and for Latah County. Hon. Edgar C. Steele, Judge.

Motion to dismiss appeal granted.

Forney & Moore, for Appellants.

Geo. W. Tannahill, for Respondent.

Counsel file no briefs on motion to dismiss.

SULLIVAN, C. J.—This action was brought to enforce the collection of a certain promissory note secured by mortgage. A judgment and decree was entered in favor of plaintiff and against the defendants. The appeal is from the judgment.

In limine, we are met with a motion to dismiss the appeal on the ground that the notice of appeal was not served on defendants Riley Clemans and Maud Clemans. Since it appears from the record that said defendants are adverse parties and their interest would be affected by a modification or reversal of the judgment, the motion must be sustained and the appeal dismissed.

This court has often held under the provisions of sec. 4808, Rev. Codes, that notice of appeal must be served on all adverse parties or their attorneys. (*Titiman v. Alamance M. & M. Co.*, 9 Ida. 240, 74 Pac. 529; *Diamond Bank v. Van Meter*, 18 Ida. 243, 108 Pac. 1042; *Miller v. Wallace*, 26 Ida. 373, 143 Pac. 524; *Kissler v. Moss*, 26 Ida. 516, 144 Pac. 647; *Chapman v. Boehm*, 27 Ida. 150, 147 Pac. 289.)

Said motion must be sustained and the appeal dismissed. Costs awarded to respondent.

Budge and Morgan, JJ., concur.

(April 19, 1915.)

W. E. CHAPMAN, Respondent, v. THE A. H. AVERILL
MACHINERY CO. et al., Appellants.

[147 Pac. 785.]

MOTION TO DISMISS—STENOGRAPHER'S TRANSCRIPT—SETTLEMENT OF.

1. Under the provisions of sec. 4434, Rev. Codes, as amended by chap. 119, Laws 1911, p. 379, in order to review the matter contained in the stenographer's transcript, such transcript must be settled by the judge.

APPEAL from the District Court of the Second Judicial District for Lewis County. Hon. Edgar C. Steele, Judge.

Motion to dismiss appeal on the ground that the reporter's transcript had not been settled by the judge. Motion sustained and appeal dismissed.

G. Orr McMinimy, for Appellants, files no brief on point decided.

G. W. Tannahill, for Respondent.

In order to raise any question of error committed by the trial court the transcript of the stenographer's notes should be settled and certified by the trial court. (*Edwards v. Anderson*, 23 Ida. 508, 130 Pac. 1001; *Strand v. Crooked River M. & M. Co.*, 23 Ida. 577, 131 Pac. 5.)

SULLIVAN, C. J.—This is an appeal from a judgment entered in favor of the plaintiff. A motion to dismiss the appeal has been made on the ground that the stenographer's notes of the evidence were not prepared, served, settled and certified as required by law, or at all.

On an examination of the transcript, we find that the reporter's notes were not settled by the trial court or judge, and on the authority of *Grisinger v. Hubbard*, 21 Ida. 469, Ann. Cas. 1913E, 87, 122 Pac. 853; and *Strand v. Crooked*

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River M. & M. Co., 23 Ida. 577, 131 Pac. 5, where it was held that in order to review the matter contained in the stenographer's transcript such transcript must be settled by the judge, the motion must be sustained and the appeal dismissed. Costs in favor of the respondent.

Budge and Morgan, JJ., concur.

(April 19, 1915.)

C. G. BRIDGHAM et al., Respondents, v. THE NATIONAL
POLE CO. et al., Appellants.

[147 Pac. 1056.]

NOTICE OF APPEAL—SERVICE OF—ADVERSE PARTIES.

1. Under the provisions of sec. 4808, Rev. Codes, the notice of appeal must be served upon every party to the action not appealing whose interest might be affected by a modification or reversal of the judgment, irrespective of whether they are plaintiffs, defendants or intervenors.

APPEAL from the District Court of the Second Judicial District for Idaho County. Hon. Edgar C. Steele, Judge.

Motion to dismiss appeal on the ground that the notice of appeal was not served on all of the adverse parties. Motion sustained and appeal dismissed.

Geo. W. Goode and F. H. Rehberg, for Appellants.

W. H. Casady, for Respondents.

Counsel file no briefs on motion to dismiss.

SULLIVAN, C. J.—This is an action brought to foreclose several laborers' liens, and judgment was rendered in favor of the lien claimants. The appeal is from the judgment.

Argument for Appellant.

A motion has been made to dismiss the appeal on the ground that appellants have failed and neglected to serve the notice of appeal on each of the adverse parties.

Upon an examination of the record, we find that the notice of appeal was not served on all of the adverse parties, and on the authority of *State Bank of Clarkston v. Watson*, ante, p. 211, 148 Pac. 470, decided at this term of court, the motion is sustained and the appeal dismissed. Costs are awarded to the respondents.

Budge and Morgan, JJ., concur.

(April 19, 1915.)

B. F. ZEHNER, Appellant, v. LEVI CASTLE, Respondent.

[148 Pac. 470.]

REAL ESTATE—ADJACENT OWNERS—BOUNDARY LINE.

1. The evidence held sufficient to support the finding of facts.

APPEAL from the District Court of the Second Judicial District for Idaho County. Hon. Edgar C. Steele, Judge.

Action to recover possession of certain real estate. Judgment for the defendant. *Affirmed*.

W. L. Campbell and F. E. Fogg, for Appellant.

In the case of *Brown v. Brown*, 18 Ida. 345, 110 Pac. 269, a case upon the facts essentially on all-fours with the case at bar, this court has sustained every vital principle now contended for by appellants. "If the agreement was made and entered into under a mistake of fact, a party is not precluded from claiming his right, as under such circumstances there is no presumption of his surrender or waiver of rights given up under misapprehension." (*Knowlton v. Smith*, 36 Mo. 507, 88 Am. Dec. 152; *Howard v. Reedy*, 29 Ga. 152, 74 Am. Dec.

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58; *Preble v. Maine Central R. Co.*, 85 Me. 260, 35 Am. St. 366, 27 Atl. 149, 21 L. R. A. 829.)

"The possession of coterminous proprietors under a mistake or ignorance of the true line and without intending to claim beyond the true line will not work a disseizin of either." (*Finch v. Ullman*, 105 Mo. 255, 24 Am. St. 383, 16 S. W. 863; *Fieldhouse v. Leisburg*, 15 Wyo. 207, 88 Pac. 214; *King v. Brigham*, 23 Or. 262, 31 Pac. 601, 18 L. R. A. 361; *Scott v. Williams*, 74 Kan. 448, 87 Pac. 550; *Shanline v. Wiltzie*, 70 Kan. 77, 78 Pac. 436, 3 Ann. Cas. 140; *Crawford v. Hebrew*, 78 Kan. 401, 96 Pac. 348.)

H. Taylor and W. N. Scales, for Respondent.

Where coterminous owners agree upon a division line and fence up to the same, and go into actual occupation, exercising acts of ownership and physical control of the premises believing the line so established and agreed upon to be the true line, whether the same be in accordance with the original government survey or not, it becomes the true boundary line between their respective premises. All subsequent owners and purchasers are bound by such agreement, and after the lapse of the statutory period of limitation are estopped from asserting any other line to be the dividing line between such premises. (*Brown v. Brown*, 18 Ida. 345, 110 Pac. 269; *Bayhouse v. Urquides*, 17 Ida. 286, 105 Pac. 1066.)

SULLIVAN, C. J.—This is an action to recover the possession of a strip of land containing about three and a half acres and for \$250 damages for withholding said land from plaintiff, and for \$15 damages for rents and profits on said land.

By his answer the defendant denies the material allegations of the complaint, and as a separate defense avers that for more than ten years immediately preceding the commencement of this action the defendant has been in the actual occupation and possession of said premises and had the same inclosed with a substantial fence, and during said time had paid all taxes on said land and had claimed said land

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adversely to plaintiff and all others; and for another defense pleads that said cause of action is barred by the provisions of secs. 4036 and 4037, Rev. Codes; and for another defense pleads that in 1888, long prior thereto and ever since said date, the defendant was and now is the owner of the land adjoining the land in question; that in 1889 one Delos Carr was then the owner of the land described in plaintiff's complaint, and that said Carr and this defendant at that time established and agreed upon a boundary line between said lands of said Carr and the defendant, and each took possession of the lands bordering on said boundary line, and that plaintiff and his grantors ever since said line was so established and agreed upon have held and claimed their respective lands up to said line and used and occupied the same exclusively, except that said plaintiff at or about the time this action was commenced claimed that said line agreed upon was not the true boundary line; that when said line was so established and agreed upon, and within a very short time thereafter, and within the year 1889, a public highway was laid out and established by the board of county commissioners of Idaho county, and the boundary line between the lands of plaintiff and defendant, as theretofore set out and as agreed upon and established, as above stated, was in the center of said public highway so established and laid out; that said public highway was fifty feet in width, and that ever since said public highway was so established the same is and has been a public highway, traveled and used by the public and kept up at public expense; that since 1889, when said highway was established, said line agreed upon, as above stated, the defendant and plaintiff and his grantor have claimed and occupied the respective lands on each side of said public highway up to the line of the same until recently, when plaintiff claimed that said line agreed upon was not the true line.

Upon the issues thus made by the pleadings, the case was tried by the court without a jury and his finding of facts was substantially in accordance with the defenses made by the answer, and, among other things, the court found that the line

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so agreed upon and established by the defendant and the said Delos Carr (who was the grantor of the plaintiff) is the true boundary line between the lands of the plaintiff and the defendant, and entered judgment to the effect that the land sought to be recovered by the plaintiff belonged to the defendant.

Under all of the facts of this case, as shown by the evidence, the plaintiff and his grantor and the defendant had since the year 1889 up to about the time this suit was commenced recognized said line agreed upon in 1889 as the correct line separating their said lands, and about the year 1889 the county commissioners of Idaho county laid out a public highway across said land making said line so agreed upon the center of said highway. Said highway had been traveled for about twenty-four years. Under these and other facts, we think the plaintiff has slept on his rights too long, if he ever had any rights, to have said line corrected.

The judgment must therefore be affirmed, and it is so ordered, with costs in favor of the respondent.

Budge and Morgan, JJ., concur.

(April 20, 1915.)

T. R. WILDS, Respondent, v. C. W. BROWN and W. S. MOOD, Appellants.

[148 Pac. 469.]

APPEAL FOR DELAY--MOTIONS TO DISMISS--DAMAGES.

1. *Held*, that the motions to dismiss must be sustained.
2. Since the appeals were manifestly taken for delay, twelve per cent penalty for damages is allowed under the provisions of rule 44 of the rules of this court.

APPEALS from the District Court of the Second Judicial District for Latah County. Hon. Edgar C. Steele, Judge.

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Motions to dismiss said appeal sustained and damages allowed.

Forney & Moore, for Appellants.

Suppiger & Curry, for Respondent.

Counsel file no briefs on motions.

SULLIVAN, C. J.—This action was brought against C. W. Brown on a judgment rendered against him by a Montana court. Mood, one of the appellants, made application to intervene, and the trial court denied his application and judgment was entered in favor of the respondent and against Brown for the amount found to be due on said Montana judgment. Two appeals were taken. Motions to dismiss said appeals were made on numerous grounds.

On an examination of the record, we find that said motions were well taken, and must be sustained and the appeals dismissed.

It appears from the record that these appeals were taken for delay, and under rule 44 of the rules of this court, where an appeal is taken manifestly for delay, damages may be allowed at not to exceed 12% upon the amount of the judgment. Since these appeals were manifestly taken for delay, damages are allowed at the rate of 12%, amounting to \$49.70, upon the sum of \$414.20, that being the amount for which said judgment was rendered, exclusive of costs, and it is so ordered. Costs are awarded to respondent.

Budge and Morgan, JJ., concur.

Argument for Appellant.

(April 21, 1915.)

CHARLES WILLIAMS, Respondent, v. DAISY E. TURNER,
Appellant.

[148 Pac. 477.]

ACTION TO QUIET TITLE—TAX DEED—FINDING OF FACTS—SUFFICIENCY
OF EVIDENCE.

1. The evidence *held* sufficient to support the finding of facts.

'APPEAL from the District Court of the Second Judicial
District for Nez Perce County. Hon. Edgar C. Steele, Judge.

Action to quiet title to certain land as against a tax deed.
Judgment for plaintiff. *Affirmed.*

Cordiner & Cordiner and Daniel Needham, for Appellant.

In order to defeat appellant's tax title to said land, respondent must prove the omission of some jurisdictional act or step in the proceedings on which appellant's tax deed is based. (*Armstrong v. Jarron*, 21 Ida. 747, 125 Pac. 170; *Black on Tax Titles*, 2d ed., sec. 454; *Wilson v. Locke*, 18 Ida. 582, 111 Pac. 247; *Stewart v. White*, 19 Ida. 60, 112 Pac. 677; *Rollins v. Wright*, 93 Cal. 395, 29 Pac. 58; *Straus v. Foxworth*, 16 N. M. 442, 117 Pac. 831, and authorities cited.)

Since Nez Perce county did not retain its tax certificate or have any interest in any tax certificate, relative to the land in controversy, on or after the first Monday in January, 1910, the provisions of sec. 1755, Rev. Codes, relative to red ink entries to be made by the assessor, never became operative in the case at bar. And the cases of *Parsons v. Wrble*, 21 Ida. 695, 123 Pac. 638, and *Griffith v. Anderson*, 22 Ida. 323, 125 Pac. 218, are not in point.

Mere excuses or mistakes are not generally sufficient to relieve the owner from the consequences of failing to exercise his statutory right within the limited time. (37 Cyc. 1418, 1419; *Conklin v. Cullen*, 29 Mont. 38, 74 Pac. 72; *Easton*

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v. Doolittle, 100 Iowa, 374, 69 N. W. 672; *Menasha Wooden Ware Co. v. Harmon*, 128 Wis. 177, 107 N. W. 299; 2 Cooley on Taxation, 3d ed., 1049; Black on Tax Titles, 2d ed., sec. 362.)

"The inquiry of the officer must, however, be specific, and refer to matters which it is his duty to disclose." (27 Am. & Eng. Ency. of Law, 2d ed., 858; *Edwards v. Upham*, 93 Wis. 455, 67 N. W. 728.)

There is no evidence which tends to show that respondent was in any manner misled by any revenue officer of Nez Perce county, or that any of said officers failed in any manner to perform duties of their respective offices.

Ben F. Tweedy and W. A. Hall, for Respondent.

The failure to make the red ink entries of taxes on the assessment-rolls invalidates a tax sale and tax deed thereon to a private individual, which sale and tax deed are made subsequently to the sale to the county. (*Fix v. Gray*, 26 Ida. 19, 140 Pac. 771; *Parsons v. Wrble*, 21 Ida. 695, 123 Pac. 638.)

SULLIVAN, C. J.—This action was brought to quiet title to about 200 acres of land situated in Nez Perce county against a tax deed owned and held by the defendant. The case was tried by the court without a jury and findings of fact and judgment entered quieting the title to said land in the plaintiff. The appeal is from the judgment.

It appears from the record that the plaintiff was the owner of said land and that it was subject to taxation and taxes were duly and regularly levied and assessed thereon for the year 1908 and were not paid, became delinquent and the land was sold at tax sale in 1909 for said delinquent taxes to Nez Perce county; that in pursuance of said sale a tax certificate was issued to the county as purchaser at said tax sale; that said land was assessed in 1909 and the taxes so assessed became delinquent and the land was sold in 1910 at tax sale; that the plaintiff redeemed from the sale of 1909,

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but failed to redeem from the sale made in 1910; that the respondent's wife, as his agent and for herself as a member of the community, appeared at the assessor's office in December, 1912, to pay the taxes on said land and then learned of the existence of the delinquent taxes of 1908, and thereupon paid, as she thought, all of the delinquent taxes against said land. It seems she was permitted to redeem from the sale to the county without making payment of the 1909 taxes and penalties thereon, and the court found, among other things, as follows:

“The plaintiff did not know that he had not paid these 1909 delinquent taxes until after the said tax deed was executed to the defendant, Daisy E. Turner, nor did he know of or have notice that he had not, on the 5th day of December, 1912, paid all delinquent taxes assessed against the said real estate at the time he redeemed the said land from the said tax sale to the said county, but believed that he had paid all delinquent taxes. On the 5th day of December, 1912, he paid to the treasurer of Nez Perce county the sum of \$24.98 in a redemption of said real estate from the said sale to the said county, that was the amount of delinquent taxes as given to him by the auditor. It was not plaintiff's fault that he then failed to pay the 1909 delinquent taxes assessed against the said real estate, but that he did not pay the said 1909 delinquent taxes, penalties, costs, fees and interest thereon was the fault of the tax officers of Nez Perce county—was the fault of the assessor of said county because of his neglecting to enter the 1909 taxes in red ink, and was also the fault of the auditor of said county in that he authorized redemption from sale to said county, without requiring payment of the 1909 delinquent taxes and everything then due to the defendant, Daisy E. Turner, and was the fault of the officers of Nez Perce county, because they failed to give the plaintiff the amount of delinquent taxes on the said real estate.”

The court also found that the plaintiff had paid all taxes assessed against said real estate for the years 1910, 1911 and 1912, and “thought he had paid the said taxes for 1909, and

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did not know then that he had not paid them until after the said deed had been executed to the defendant."

Upon a careful consideration of all the record, we are satisfied that the evidence is sufficient to sustain those findings of the court, and that the judgment of the court must be affirmed, with costs in favor of the respondent.

Budge and Morgan, JJ., concur.

(April 21, 1915.)

STATE, Respondent, v. IDELL FLOWER, ED. LUKE and
PHOEBE LUKE, Appellants.

[147 Pac. 786.]

**GRAND LARCENY—INFORMATION—SUFFICIENCY OF—STOLEN PROPERTY—
WIFE'S POSSESSION OF—STATUTORY CONSTRUCTION.**

1. An information may properly be divided into four parts: 1, the caption, 2, the inducement or commencement, 3, the charging part, and 4, the conclusion.

2. The most substantial part of the information is the charging part, and the charging part of every criminal information for grand larceny must not only name the person charged but it must state what was stolen by that particular person and where and when it was stolen, and if those things are not stated, the information is not sufficient to charge a public offense.

3. An information which in the caption contains the names of several persons all but one of which are thereafter contained in the charging part of the information, is not sufficient to charge the person with a crime whose name is thus omitted from the charging part.

4. Under the laws of this state, the domicile of the husband is presumed to be the domicile of the wife, and under the provisions of sec. 2675, Rev. Codes, the husband is the head of the family and may choose any reasonable place or mode of living, and the wife must conform thereto; and in case the husband commits the crime of grand larceny and takes the personal property stolen to his residence where his wife and family reside, it would take other and further evidence to convict the wife than the mere fact that such

Argument for Appellants.

stolen property was found in the home where she resided with her husband.

5. The evidence *held* not sufficient to sustain the verdict of guilty against Idell Flower.

6. *Held*, that instructions Nos. 6 and 8 correctly state the law, are not contradictory, and the court did not err in giving them.

7. *Held*, that the defendants Phoebe Luke and Idell Flower must be discharged and released from custody under the judgment entered by the trial court.

APPEAL from the District Court of the Seventh Judicial District, in and for Canyon County. Hon. Ed. L. Bryan, Judge.

The defendants were convicted of grand larceny and sentenced to the state penitentiary. Judgment reversed as to Idell Flower and Phoebe Luke.

Scatterday & Van Duyn, for Appellants.

The caption neither takes from nor adds to the validity of an indictment. (*Commonwealth v. Drewry*, 126 Ky. 183, 103 S. W. 266; *Mitchell v. Commonwealth*, 106 Ky. 602, 51 S. W. 17.)

In charging the offense, nothing is left to implication or intendment or to conclusion. (22 Cyc. 336, and authorities cited.)

An indictment or information must name the defendant whom it is intended to charge with the offense therein alleged, and an omission in this regard will make the indictment bad. (10 Cyc. Plead. & Prac. 504 (XI).)

The omission of a material averment in an indictment cannot be supplied by an instruction or by the proof or by the findings of the jury of the fact not alleged. (22 Cyc. 296.)

Where a specific act is to be made, by proof, the basis of a charge in a criminal case, that specific act must be alleged. (*Hoyt v. State*, 50 Ga. 313; *United States v. Martindale*, 146 Fed. 289; *State v. Laechelt*, 18 N. D. 88, 118 N. W. 240; *State v. Stowe*, 132 Mo. 199, 33 S. W. 799; *State v. McKinney*, 130 Iowa, 370, 106 N. W. 931.)

Argument for Respondent.

In Chamberlayne on Modern Evidence (sec. 1134, note), it is said that property found to be in the possession of the husband and wife will be taken to be in the possession of the husband.

J. H. Peterson, Atty. Genl., Herbert Wing, E. G. Davis and T. C. Coffin, Assts., for Respondent.

The state concedes the position of the defendant with regard to insufficiency of information as against Phoebe Luke to be well taken. This court, in the case of *State v. Smith*, 25 Ida. 541, 138 Pac. 1107, held that the facts and circumstances constituting the offense must be stated in ordinary concise language. The cases cited by the appellant are in point on this question, and we would particularly call attention to the case of *State v. Stephens*, 199 Mo. 261, 97 S. W. 860, and also to 10 Ency. Pleading and Practice, 476, 504.

The instruction upon the question of recently stolen property will be found to be in exact accord with the rulings of this court. (*State v. Bogris*, 26 Ida. 587, 144 Pac. 789.)

While marriage does not take from the wife her capacity to commit crime, it does cast upon her the duty of obedience to and affection for her husband, and the law therefore indulges in the presumption that if she commits an offense in his presence, it was the result of his constraint or coercion, and in the absence of proof to the contrary excuses her. (*State v. Müller*, 162 Mo. 253, 85 Am. St. 498, 62 S. W. 692; *State v. Ma Foo*, 110 Mo. 7, 33 Am. St. 414, 19 S. W. 222; *Bibb v. State*, 94 Ala. 31, 31 Am. St. 88, 10 So. 506; *State v. Harvey*, 130 Iowa, 394, 106 N. W. 938.)

Under the circumstances shown in this case, the possession of these articles of personal property by Mrs. Flower was properly to be considered by the jury as a circumstance against her, especially in view of the fact that there is circumstantial evidence tending to connect her with the commission of larceny and that at the time she was neither in the presence nor under the control of her husband.

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SULLIVAN, C. J.—On the 17th of November, 1914, the prosecuting attorney of Canyon county filed an information against Idell Flower, Ed. Luke, Phoebe Luke, Frank Russell, George Russell, John Black and Theodore Black, charging them with the crime of grand larceny. The defendants were arraigned and plead not guilty. A trial was had and the jury found Idell Flower, Ed. Luke and Phoebe Luke guilty of the crime charged, and the other defendants were found not guilty. On December 4th, 1914, judgment was pronounced against the defendants found guilty, whereby Idell Flower and Phoebe Luke were each sentenced to imprisonment in the state penitentiary for a period of not less than three years and not more than fourteen years, and Ed. Luke was given a term of imprisonment for not less than five years and not more than fourteen years. A motion for a new trial was made and denied and this appeal is from the judgment and order denying a new trial.

Before proceeding to discuss and dispose of the errors assigned, we will set forth some of the facts shown by the record:

Ed. Luke and his wife, Phoebe Luke, resided on a farm owned by one Rowland, which farm was situated about two miles northeast of Wilder, in Canyon county, and with them lived two other of the defendants, John and Theodore Black, and one George Ash and his wife, the wife being the daughter of Mrs. Luke. The defendant Idell Flower was a sister of Mrs. Luke, and lived just out of the city limits of Emmett, in Canyon county. Mrs. Flower, during the summer of 1914, was living with her husband and her two sons, Frank and George Russell, who were also defendants in this action.

It appears that in the Black Canyon Irrigation District, extending from above Emmett to near Caldwell, there were a number of homesteaders who had houses on their homesteads furnished with stoves, bedding and other personal property used for their convenience in residing on their homesteads, and during the summer and fall of 1914 many of these houses were looted and the furniture and other personal property was stolen. It was the custom of the homesteaders to close

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up their houses and leave them for perhaps weeks at a time, as they had a right to do under the homestead laws, and it was during their absence this looting occurred. A considerable amount of this stolen property was found in the possession of the defendants Luke and Flower at their residences, and on the trial of this case much of this property was identified by the owners.

The first error assigned is to the effect that the information is insufficient to charge Phoebe Luke with the crime of grand larceny. The caption of the information is as follows:

“B. W. Henry, Prosecuting Attorney in and for the county of Canyon, State of Idaho, who, in the name and by the authority of said State, prosecutes in this behalf, in proper person comes into said court, at the county of Canyon, on the 17th day of November, 1914, and gives the said court to understand and be informed that Idell Flower, Ed. Luke, Phoebe Luke, Frank Russell, George Russell, John Black and Theodore Black are accused by this information of the crime of grand larceny, committed as follows:”

The charging part of said information is as follows:

“The said Idell Flower, Ed. Luke, Frank Russell, George Russell, John Black and Theodore Black, on or about the 23d day of September, A. D. nineteen hundred and fourteen and prior to the filing of this information at the County of Canyon, in the State of Idaho, did then and there wilfully, unlawfully and feloniously take, steal and carry away the personal property of Anna Feigh, of the value of One Hundred Five dollars (\$105), described as follows: 1 six-hole standard range, one feather bed, three pairs feather pillows, one bed mattress, one bed spring, one iron bedstead, eight comforts, three couch pillows, one pair woolen blankets, two bed spreads, six table cloths, two and one-half dozen napkins, four bed sheets, two sacks flour, four chairs, photographs, pictures, kitchen cooking utensils, china dishes, and table silverware, contrary to the form, force and effect of the statute in such cases made and provided, and against the power, force and dignity of the State of Idaho.”

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It will be observed that the caption of said information as above quoted contains the name of Phoebe Luke, but her name does not appear in the charging part, nor is the said Phoebe Luke, by reference to the caption or otherwise, mentioned in the charging part of the information.

An information is divided into four parts: 1st, the caption; 2d, the inducement or commencement; 3d, the charging part, and 4th, the conclusion. The substantial part of the information is the charging part. It is elementary law that every criminal information for grand larceny must not only name the person charged, but that it must state what was stolen by that particular person and where and when it was stolen, and if those things are not charged, the information does not state facts sufficient to constitute a public offense. In the charging part of said information the name of Phoebe Luke does not appear among the other defendants whose names are mentioned therein, and she was not there charged with the other defendants of feloniously stealing the personal property therein described, and for that reason the information does not charge a public offense against Phoebe Luke. Now, since the jury found her guilty of the offense charged against her in the information, and there is no offense charged against her therein, the defendant was not legally convicted. Therefore the judgment as to her must be set aside and she must be discharged from custody.

And again: There is no evidence whatever to show that Phoebe Luke committed the crime of grand larceny. To be found guilty of the crime of grand larceny, the party charged must be found guilty of committing the crime in person or aiding and abetting another or others in committing the same. The evidence in this case only shows that Mrs. Luke lived with her husband, Ed. Luke, in the house where a part of the stolen property was found.

There is no direct evidence against any of the defendants; that is, they were not seen stealing and carrying away said property. The entire evidence is circumstantial. It shows that a part of said stolen property was found in the house of Ed. Luke and the rest of it in the home of Idell Flower

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and her husband. It seems that Idell Flower's husband left the country shortly before the arrest of the other defendants and has not been apprehended.

Under the laws of this state the domicile of the husband is presumed to be the domicile of the wife. Under the provisions of sec. 2675, Rev. Codes, the husband is the head of the family. He may choose any reasonable place or mode of living and the wife must conform thereto. Now, if the husband commits the crime of grand larceny and takes the property stolen to his residence, where his wife and family reside, it would certainly take some further evidence to convict the wife of aiding and abetting in said crime than the mere finding of such property at the place where the wife resided with her husband. In other words, in order to convict the wife the state must show that she possessed guilty knowledge of the theft of such property and aided and abetted her husband in concealing it. The unexplained possession in the home would not be sufficient to convict her. Even if the wife knew that her husband had stolen this property and brought it to their home, as a matter of law the wife could not be convicted for having this knowledge, as the law does not require the wife to inform against her husband. However, it is possible that under some circumstances the wife might be informed against and proven guilty of receiving stolen property or having stolen the property in her possession.

In this particular case, however, the charge was for grand larceny, to wit, the taking and carrying away of property belonging to another of the value exceeding \$60, and it is necessary to prove, in order to convict Mrs. Luke and Mrs. Flower, that they each had carried away or aided and abetted in carrying away or in concealing the property alleged to have been stolen. There is no evidence in the record to show that Mrs. Flower or Mrs. Luke either took and carried away the personal property referred to in the information, and the mere fact that said personal property was found in the homes of the husbands of these defendants is not sufficient in itself to convict them of the crime charged.

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Mrs. Flower testified that when certain of this stolen property was brought to their home, she asked her husband where he got it, and he told her he purchased it at a second-hand store in Emmett, and as he was a drinking man and sometimes beat her, she did not pursue the investigation further.

We do not think the evidence is sufficient to sustain the verdict of guilty against the defendant Mrs. Flower.

It is suggested by counsel for appellant that instructions Nos. 6 and 8 given by the court are contradictory and prejudicial to the rights of the defendants. Upon an examination of said instructions, we are satisfied that the instructions taken together state the law of the case and there was no error in giving them.

So far as the defendant Ed. Luke is concerned, the evidence is amply sufficient to sustain the verdict and judgment, and the judgment is therefore affirmed as to him and reversed as to Idell Flower and Phoebe Luke, and said Idell Flower and Phoebe Luke are directed to be discharged by the officer having them in custody. It is hereby directed that a certified copy of the judgment of this court be served immediately upon the officer having said Idell Flower and Phoebe Luke in custody, which shall be his warrant for discharging them from custody or imprisonment, as provided by sec. 8074, Rev. Codes.

Budge and Morgan, JJ., concur.

Points Decided.

(April 23, 1915.)

In Re Application of FRED L. HUSTON for Writ of *Habeas Corpus*.

[147 Pac. 1064.]

STATE AUDITOR—DUTIES OF—NOT CUSTODIAN OF PUBLIC FUNDS—APPLICATION OF SEC. 6975, REV. CODES—MISTAKE IN MINISTERIAL DUTIES—REMEDY.

1. In order to warrant a conviction under sec. 6975, Rev. Codes, it must be found that the defendant officer is, in the language of the statute, "charged with the receipt, safekeeping, transfer or disbursement of public moneys."

2. The state auditor in his official capacity as such officer is not the custodian of public moneys, within the meaning of sec. 6975, Rev. Codes, and is not properly classified with those public officers who receive public moneys, or are charged with safekeeping, transferring or disbursing the same, with relation to his official duties in drawing warrants on public funds.

3. Sec. 6975, Rev. Codes, was intended for the punishment of that particular class of public officers who, being charged with the custody of public funds, fraudulently appropriate to their own use or the use of another a portion of such funds, in violation of their trust.

4. It is not the intent of the law to hold a public official criminally responsible for a mistake of judgment, under a severe penalty in case he has made such mistake, in the absence of actual fraud, theft, conspiracy to cheat, or some felonious and unlawful attempt to deprive the state of its public moneys.

5. After a claim has been submitted to the state board of examiners as provided by law, and the same has been examined, audited and allowed, and the auditor directed to draw a warrant in favor of the claimant, it becomes the ministerial duty of the auditor to draw such warrant.

6. If a mistake is made by the auditor in drawing a warrant upon the wrong fund or item in the same department, in the absence of collusion, theft or actual fraud on the part of the auditor, resort should be had to the civil rather than the criminal law, in accordance with the following provision of sec. 145, Rev. Codes, as amended, Sess. Laws 1913, p. 57: "For the proper performance of the duties herein enjoined upon the state auditor, as secretary of the state board of examiners, or for any unlawful or irregular pay-

Argument for Petitioner.

ment of any account submitted against the state, the state auditor is hereby made responsible upon his official bond."

7. *Held*, that as the facts alleged in the indictment do not state a public offense against the petitioner, he must be discharged, and it was so ordered.

Original application in this court by Fred L. Huston for a writ of *habeas corpus*. After hearing, the petitioner ordered discharged.

Edwin Snow, for Petitioner.

In all cases where it has been sought to indict state or county auditors under the provisions of this statute, it has been held that such officers are not "charged with the receipt, safekeeping, transfer or disbursement of public moneys" within the meaning of this statute. (*State v. Newton*, 26 Ohio St. 265; *State v. Myers*, 56 Ohio St. 340, 47 N. E. 138; *Moore v. State*, 53 Neb. 831, 74 N. W. 319; *State v. Moore*, 56 Neb. 82, 76 N. W. 474; *Sherrick v. State*, 167 Ind. 345, 79 N. E. 193; *State v. Pierson*, 83 Ohio St. 241, 93 N. E. 967; *State v. Heath*, 70 Mo. 565; 10 Am. & Eng. Ency. Law, 1019, 1020.)

The mischief sought to be remedied by statutes similar to the one under which this indictment was brought was the misuse for private purposes of public funds by officers who, by virtue of their office, had such funds in their custody and control. Indeed, in some cases, where statutes, word for word and exactly similar to ours, have been construed, it is plainly and clearly stated that the crime denounced is embezzlement. (*Storm v. Territory*, 12 Ariz. 35, 94 Pac. 1102.)

The state board of examiners, under the law and the constitution, has the sole and absolute discretion in regard to what are and what are not valid and just claims against the state. (*Bragaw v. Gooding*, 14 Ida. 288, 94 Pac. 438.)

It may have been irregular, or even wrong, to pay the \$90 out of the particular fund from which it was paid, but it is absolutely unthinkable that the use of public money in payment of the state's just debts could be construed to be the

Argument for Respondent.

appropriation of so much money to the private use of the disbursing officer or of the person to whom it was paid.

"One cannot be convicted of embezzlement when it appears that all moneys collected by such person in his fiduciary capacity have been fully paid to the . . . department of government to which the funds should have been paid. The case is not altered if the payments are made on the wrong account." (*United States v. Elvina*, 24 Philippine Rep. 230.)

Raymond L. Givens, E. P. Barnes and J. M. Parrish, for Respondent.

A deputy or subordinate officer cannot escape criminal liability by reason of having received orders from his principal to commit an illegal act. (*State v. Cutts*, 24 Ida. 329, 133 Pac. 115.)

The very terms of the general appropriation act (1913 Sess. Laws, p. 637) prescribed in sec. 1 thereof, negatives the defense of ignorance or excusable misinformation. Again, in sec. 4, page 645, the distinct duty is laid upon the state auditor to classify the vouchers as to the several departments and state institutions.

In addition to the plain wording of the statute, our own supreme court has passed upon the precise question involved here to the effect that there can be no payment of public moneys without an appropriation therefor, by reason of the constitutional and statutory inhibitions and regulations thereof, and that in the absence of such appropriation, the mere fact that the debt is a valid obligation against the state constitutes no defense. (*Kingsbury v. Anderson*, 5 Ida. 771, 51 Pac. 744.)

Since the *Kingsbury* case the rule laid down has never been deviated from, and in several recent decisions wherein the petitioner herein was party, our supreme court has re-enunciated the same rule, and the petitioner cannot claim, in the light of these decisions, absence either of knowledge of the facts or understanding as to the proper construction to be placed upon the law applicable to the matter at bar. (*Jeffreys v. Huston*, 23 Ida. 372, 129 Pac. 1065; *McPherson v.*

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Huston, 24 Ida. 21, 132 Pac. 107; *Falk v. Huston*, 25 Ida. 26, 135 Pac. 745.)

In the light of these cases wherein the petitioner was defendant and is thus charged with knowledge as to the law because of the decisions of this court, his attempted defense of the custom or usage as sanctioning the payment of moneys from one appropriation or fund for services rendered in some other department is refuted. (*Stratton v. Green*, 45 Cal. 149; *People v. Commrs.*, 120 Ill. 322, 11 N. E. 180; *State v. Young*, 18 Wash. 21, 50 Pac. 786; *State v. Burdick*, 4 Wyo. 290, 33 Pac. 131; *In re Internal Improvements*, 18 Colo. 317, 32 Pac. 611.)

The indictment being based on sec. 6975, the mere doing of the act unlawfully is sufficient to sustain the indictment, irrespective of the intent; hence unnecessary to charge intent. (*State v. Browne*, 4 Ida. 723, 44 Pac. 552.)

The authorities are clear in regard to the making of separate and distinct appropriations for the different departments and the inhibition against payments for other purposes or from other funds. (*State v. Holmes*, 19 N. D. 286, 123 N. W. 884; *Menefee v. Askew*, 25 Okl. 623, 107 Pac. 159, 27 L. R. A., N. S., 537; *State v. Eggers*, 36 Nev. 372, 136 Pac. 100; *Spaulding v. People*, 172 Ill. 40, 49 N. E. 993, at 999; *Whittemore v. People*, 227 Ill. 453, 10 Ann. Cas. 44, 81 N. E. 427, at 432; *People v. Beveridge*, 38 Ill. 308; *State v. Ristine*, 20 Ind. 345.)

BUDGE, J.—The petitioner, Fred L. Huston, auditor of the state of Idaho, was indicted by the grand jury of Ada county, on January 13, 1915, which indictment, eliminating the title, reads as follows:

“James H. Wallis and F. L. Huston are accused by the Grand Jury of the County of Ada, in the State of Idaho, by this indictment of the crime of without authority of law appropriating public moneys committed as follows, to wit: That on or about the twentieth day of August, 1914, and before the finding of this indictment at Boise, in the County of Ada, State of Idaho, the said James H. Wallis then and there being the duly appointed, qualified and acting Dairy, Food

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and Sanitary Inspector of the State of Idaho, and the said F. L. Huston, being then and there the duly elected, qualified and acting Auditor of the State of Idaho, and as such Auditor charged with the lawful disbursement of public moneys, did, wilfully, unlawfully, and feloniously and not in the due and lawful execution of their trust as such public officers appropriate funds and public moneys belonging to the State of Idaho, without authority of law to the use of Robert Wallis in the sum of Ninety (\$90.00) Dollars, lawful money of the United States of America, by then and there paying to the said Robert Wallis, as salary, the said sum of Ninety (\$90.00) Dollars, lawful money of the United States of America, out of the traveling expense fund of the said State Dairy, Food and Sanitary Department appropriation of the State of Idaho for services rendered in the Bacteriological Department of the Health Department of the State of Idaho."

James H. Wallis is not a party to the petition herein for a writ of *habeas corpus* and is in no way connected with this proceeding.

This indictment was returned under sec. 6975, Rev. Codes. We will quote such portions of said section only as are conceded by counsel for respective parties to form a basis for this indictment, to wit:

"Each officer of this state, or any county, city, town, or district of this state, and every other person charged with the receipt, safekeeping, transfer, or disbursement of public moneys, who either:

"1. Without authority of law, appropriates the same or any portion thereof to his own use, or to the use of another;

...

"Is punishable by imprisonment in the state prison for not less than one nor more than ten years, and is disqualified from holding any office in this state."

The facts in this case are not disputed and briefly stated are as follows:

Robert Wallis rendered services in the bacteriological laboratory for the months of June, July and August, 1914, at a fixed compensation of \$90, for which amount he presented

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a claim to the head of the department, which claim was subsequently filed with F. L. Huston, state auditor, as secretary of the state board of examiners. This claim was regularly listed and filed by said secretary with the state board of examiners as provided by law, and subsequently was by the board of examiners audited and duly allowed. Whereupon the state auditor was directed by the state board of examiners to draw a state warrant in favor of the claimant for the full amount of his claim. The bacteriological laboratory is under the supervision of the state board of health. The state dairy, food and sanitary department is likewise a department of the state board of health. The indictment charges, in effect, that the petitioner paid the said Robert Wallis the sum of \$90, out of the traveling expense fund of the state dairy, food and sanitary department appropriation for services rendered in the bacteriological department of the health department of the state of Idaho. The gist of the offense charged appears to be that the money was paid out of the traveling expense fund of the state dairy, food and sanitary department appropriation instead of being paid out of the appropriation for the bacteriological department of the health department of the state of Idaho. It will be remembered that both these departments are under the general supervision and are integral parts of the state board of health. It is admitted that the services were rendered; that the amount charged for the services so rendered is not excessive; that the obligation was a valid claim against the state; that the petitioner in no way benefited, directly or indirectly, by reason of the employment of said claimant or the payment of said claim; that the state lost no money, but that an honest valid obligation, lawfully incurred, was paid by the issuance of the warrant in question. The only contention on the part of the prosecuting attorney of Ada county is that these services were paid for from the wrong fund, or item of an appropriation made by the legislature for the maintenance of an integral part of a general department, and that this fact alone makes the state auditor guilty of a felony under sec. 6975, Rev. Codes, *supra*, to wit:

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“Without authority of law” appropriating public moneys to his own use or that of another.

Sec. 6975, Rev. Codes, *supra*, is a criminal statute, enacted for the purpose of protecting the public revenue. It relates to state, county, city, town or district officers, and to every person charged with the *safekeeping, transfer, or disbursement of public moneys*. It makes certain specified acts crimes, punishable on conviction, in the state prison for not less than one nor more than ten years. This section is divided into ten subdivisions, each of which relates to a separate and distinct class or provision. Some acts mentioned are clearly *mala prohibita*, and on a trial involving such acts, it is not necessary, in order to establish guilt, to show intent on the part of the person charged. Such, for instance, is the offense prescribed in subdivision 4 of said section, to wit: Depositing public money “or any portion thereof in any bank, or with any banker or other person, otherwise than on special deposit, or as otherwise authorized by law.” This subdivision of said section was construed by this court in the case of the *State v. Browne*, 4 Ida. 723, 44 Pac. 552, and is relied upon in order to secure a conviction of the defendant in the case at bar. There is, however, a clear distinction between that case and the case at bar. The facts are entirely different. The principles of law applied in that case cannot consistently be made applicable to the case at bar. In the case above cited, the indictment charged Gilstrap, county treasurer of Latah county, and Browne and Hattabaugh, codefendants, with having feloniously entered into a written contract by the terms of which Gilstrap agreed to deposit in the Moscow National Bank, of which Browne was president, and in the Commercial Bank at Moscow, of which Hattabaugh was president, any and all sums of money belonging to said Latah county, state of Idaho, coming into the possession of or under the control of Gilstrap as treasurer of said Latah county. That in pursuance of said contract, the said Gilstrap, as such treasurer as aforesaid, deposited with said banks large sums of money of said Latah county which had come into his hands as such treasurer as aforesaid, in violation of sec. 6975, *supra*. Gil-

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strap was charged with the receipt, safekeeping, transfer, or disbursement of the public moneys of Latah county as treasurer of said county. He had the actual custody and control of the money and the corporeal possession thereof. He was aided and abetted in the wrongful and unlawful act of depositing the public moneys in the banks of his codefendants, contrary to law, by acting in collusion with Browne and Hattabaugh, who became principals in the violation of the provisions of said section 6975, *supra*, and were equally amenable under the law with the county treasurer, Gilstrap.

Is the petitioner, as state auditor, charged with the receipt, safekeeping, transfer or disbursement of public moneys, within the meaning of sec. 6975, Rev. Codes, *supra*?

The word "receipt" is defined by lexicographers as "an acknowledgment of the fact of payment."

The word "safekeeping" as defined by the same authorities is that "Where an instrument signed by a depositary, acknowledging that another person has deposited with him for 'safekeeping' a certain number of dollars in gold, which the depositary is to return when called for, such phrase implies that there is a special deposit." (*Wright v. Paine*, 62 Ala. 340, 344, 34 Am. Rep. 24.)

It must be admitted that only money in possession could be meant by the word "receipt" or "safekeeping."

The word "disbursement," which is used interchangeably with the word "transfer" in sec. 6975, *supra*, has been construed to mean "money expended by an executor, guardian, trustee, etc., for the benefit of the estate in his hands or in connection with its administration." This word is also defined in the Century Dictionary, vol. 2, p. 1644, as follows: "1. The act of paying out or expending as money. 2. Money paid out; an amount or sum expended, as from a trust, or a corporate or public fund; as, the disbursements of the treasury, or of an executor or a guardian." The Standard Dictionary, page 521, defines "disbursement," as, "1. The act or process of disbursing. 2. A sum paid out; money expended, especially from public funds."

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The above definitions of the words, "receipt," "safekeeping," "transfer" and "disbursement" of public moneys are all inconsistent with any idea except that the person transferring or disbursing has the actual corporeal possession, control or custody of the thing sought to be transferred or disbursed.

The state auditor, in his official capacity, is not the custodian of public moneys within the meaning of sec. 6975, Rev. Codes, *supra*. He is not authorized to receive public moneys or to safely keep, transfer, or disburse the same. In order to warrant his conviction under sec. 6975, *supra*, it must be found that he is charged, or in some manner entrusted by law with the receipt, safekeeping, transfer, or disbursement of public moneys.

In our opinion, sec. 6975, Rev. Codes, *supra*, was aimed at the crime of embezzlement and against a particular class of persons who fraudulently appropriate to their own use, or to the use of others, not in the due and lawful execution of their trust, any property which comes into their possession or under their control by virtue of the official position which they hold or in violation of a trust. Under the law of this state, a state auditor does not come within the class of persons against whom said section is aimed, for the reason that he is not charged under the statute with the receipt, safekeeping, or disbursement of public moneys. He is but one of several whose combined acts are absolutely necessary to ultimately bring about the disbursement of public moneys.

From an examination of decisions construing practically the same provisions that we have in said section 6975, Rev. Codes, it has been universally held that auditors, who are not charged with the receipt, safekeeping, transfer, or disbursement of public moneys, do not come within the meaning of said section. (*State v. Pierson*, 83 Ohio St. 241, 93 N. E. 967; *State v. Heath*, 70 Mo. 565; 10 Am. & Eng. Ency. Law, 1019, 1020; *Moore v. State*, 53 Neb. 831, 74 N. W. 319; *State v. Moore*, 56 Neb. 82, 76 N. W. 474.)

When penalties are directed against a particular class, a description of the class and of the defendant as coming therein

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are essential elements of the crime and must be charged and proved. (*Moore v. State, supra.*) Under the constitution and laws of this state certain officers are required to charge, collect and account for fees received for services performed in an official capacity, while other officers, performing like services, are not required to so charge, collect, or account for such fees. For example: Probate judges and other specified officers are required to charge and account for fees received by them for performing marriage ceremonies. Justices of this court and district judges are not, because they are not within a class who are charged with the receipt, safekeeping, or accounting of such fees.

In the case of the *State v. Newton*, 26 Ohio St. 265, the supreme court in construing section 6841, Revised Statutes of Ohio, which is similar to sec. 6975, Rev. Codes, said:

“Under the laws as they stood prior to the year 1858, the oath of office and official bond of a state or county treasurer were deemed sufficient, without the aid of criminal legislation, to insure the safety and proper application of all money that might come into their hands by virtue of their respective offices. . . .

“The auditor of state as to the treasurer of state, and the county auditor as to the county treasurer, under the prior laws, stood in the same official relation to each other that they do now, and their relative duties were substantially the same. Under the prior laws, no one supposed that the county auditor was responsible for the public moneys in the hands of the county treasurer, and clearly the law imposed no such responsibility, and there was no complaint on the part of the public that the auditor of state or county auditor had not faithfully and satisfactorily performed their official duties; and hence, as to them, there existed no necessity for penal legislation. While this was the case in reference to state and county auditors, it was not so in reference to state treasurers, county treasurers, and other officers into whose hands the public moneys came by virtue of their offices or employment. Defalcations by these officers became frequent, the treasurers of state not excepted. The public money was squandered and lost;

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. . . . In these respects, the evils became insufferable, and, for the purpose of remedying them, the legislature, in 1858, passed two statutes—the first entitled ‘An act to further provide for the better regulation of the receipt, disbursement, and safekeeping of the public revenue’ (S. & C. 1596); the second entitled ‘An act to establish the independent treasury of the state of Ohio.’ The provisions of these acts are much more stringent, in all respects, than those of previous acts, as applied to treasurers of state or county treasurers; it is impossible to avoid the conclusion that the penalties provided by the fifteenth section of the independent treasury act are particularly pointed at treasurers—state, county, township, city—and other officers whose duties are similar, and not at auditors of state or county auditors.”

In the case of *Storm v. Territory*, 12 Ariz. 35, 94 Pac. 1102, the supreme court of the state of Arizona had under consideration sec. 439, Arizona Rev. Codes of 1913 (sec. 398, Penal Code, 1901), which is identical with sec. 6975, Rev. Codes, *supra*. The defendant, a county treasurer, had been convicted of embezzlement and on appeal the supreme court said: “The judgment and sentence of the court denominated the crime for which the defendant was indicted and convicted as embezzlement. It is contended that this is erroneous; that the crime is not embezzlement. That portion of sec. 398 of the Penal Code [sec. 439 of the 1913 Revision] under which the defendant was indicted and convicted reads: ‘Every officer of any county, of this territory, charged with the receipt, safekeeping, transfer or disbursement of public moneys, who, without authority of law, appropriates the same or any portion thereof to his own use, is punishable,’ The appropriation by a county treasurer to his own use, without authority of law, of public moneys in his official possession, is fraudulent, and is therefore embezzlement. Therefore the judgment and sentence of the court are not erroneous in describing the offense of which defendant was convicted as embezzlement.”

It is not charged in the indictment that the defendant Huston misappropriated public moneys which were actually

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in his possession or under his control as state auditor, or that he aided or abetted the lawful custodian in misappropriating the same.

The state auditor cannot legally draw a warrant in favor of a claimant, such as the one described in the indictment, except as authorized and directed so to do by the state board of examiners, whose duties in this respect are prescribed by the provisions of sec. 146, Rev. Codes, as amended, Sess. Laws 1913, p. 58, reading as follows: "It shall be the duty of the state board of examiners to examine all claims, except salaries and compensation of officers fixed by law. . . . The board may approve or disapprove any claim or demand against the state or, any item thereof, or may recommend a less amount in payment of the whole, or any item thereof. . . . But no claim shall be examined, considered or acted upon by said board, unless the state auditor, as secretary of the state board of examiners, shall have indorsed thereon the certificates required to be made by him by section 145h, and unless receipted vouchers are therewith showing the payment of all items for which reimbursement is asked." (*Thomas v. State*, 16 Ida. 81, 100 Pac. 761; *Winters v. Ramsey*, 4 Ida. 303, 39 Pac. 193; *Bragaw v. Gooding*, 14 Ida. 288, 94 Pac. 438; *State v. Hallock*, 20 Nev. 326, 22 Pac. 123; *Pyke v. Steunenberg*, 5 Ida. 614, 51 Pac. 614.)

The state treasurer is not only authorized under the law, but it is made his duty, as such officer, to refuse the payment of a state warrant drawn by the state auditor unless he is satisfied that it is a proper and legal charge against the state. (*Gibson v. Kay*, 68 Or. 589, 137 Pac. 864; *State v. Brown*, 10 Or. 215; *Crutcher v. Cram*, 1 Ida. 372.) A warrant drawn by the state auditor is but *prima facie*, and not conclusive evidence of the validity of the allowed claim, and unless there is authority of law for the payment of such claim, the treasurer may refuse, and indeed it is his duty to refuse, to pay the warrant, even if funds are appropriated. (*Goldsmith v. Baker City*, 31 Or. 249, 49 Pac. 973; *State v. Lindsley*, 3 Wash. 125, 27 Pac. 1019; *State v. Brown*, 10 Or. 215; *Shattuck v. Kincaid*, 31 Or. 379, 49 Pac. 758.) In the case of the *State*

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v. Hastings, 10 Wis. 525, the court said: "And in respect to the auditor, to whom there is a delegation of authority to do all acts connected with accounts and claims against the state, and to certify them to the treasurer for payment, it may be said that he is a general agent. But it by no means follows therefrom, that all his acts are conclusive upon the state. There is a broad distinction in this respect between the acts of general agents of the public and those of general agents of private individuals or corporations. Whilst the latter may, and oftentimes do, bind their principals, when acting beyond the scope of their authority or instructions, yet the former never can."

An officer not charged by law to collect, and who has no right to the public money, cannot be convicted of embezzling money received under color of his office, though he falsely represented that he was entitled by virtue of his office to receive it. (*State v. Bolin*, 110 Mo. 209, 19 S. W. 650.)

In the case of *Sherrick v. State*, 167 Ind. 345, 79 N. E. 193, the court said (quoting from an opinion of Justice Marshall, in *United States v. Wiltberger*, 5 Wheat. 76, 96, 5 L. ed. 37): "To determine that a case is within the intention of the statute its language must authorize us to say so. It would be dangerous, indeed, to carry the principle that a case which is within the reason or mischief of a statute is within its provisions, so far as to punish a crime not enumerated in the statute because it is of equal atrocity or of a kindred character with those that are enumerated.' Penal statutes are to reach no further in meaning than their words. No person is to be made subject to them by implication; and all doubts concerning their interpretation are to preponderate in favor of the accused. . . . *Johns v. State*, 19 Ind., at page 429, 81 Am. Dec. 408; Bishop, St. Crimes (3d ed.), sec. 190e; McClain, Cr. Law, sec. 85; . . . *State v. Meyers*, 56 Ohio St. 340, 47 N. E. 138; . . . To illustrate: A statute making a county treasurer who converts the public moneys in his custody guilty of embezzlement cannot be extended to embrace his deputy. (*State v. Meyers, supra.*)" In the case of *Sherrick v. State, supra*, the court further said: "Constructive crimes—crimes

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built up by courts with the aid of inference, implication, and strained interpretation—are repugnant to the spirit and letter of the criminal law.”

As we have heretofore stated, it is not alleged in the indictment that the defendant is a person charged with the receipt, safekeeping, transfer, or disbursement of public moneys, who, “without authority of law, appropriates the same or any portion thereof to his own use, or to the use of another”; but the pleader adroitly attempts to apply said statute by merely alleging that the state auditor, “as such auditor charged with the lawful disbursement of public moneys, did, willfully, unlawfully, and feloniously and not in the due and lawful execution of their [his] trust as such public officers [officer] appropriate funds and public moneys belonging to the State of Idaho, without authority of law by then and there paying to the said Robert Wallis, as salary, the sum of ninety (\$90.00)” Not being charged with the receipt, safekeeping, transfer or disbursement of the public moneys under said section, he cannot be charged with the unlawful and felonious disbursement of said moneys not in the due and lawful execution of his trust. It is not contended that the money was appropriated for a personal use by the state auditor, but that he appropriated the public moneys to the use of another, by then and there paying to the said Robert Wallis, as salary, the said sum of \$90, lawful money of the United States, out of the traveling expense fund of the state dairy, food and sanitary department appropriation of the state of Idaho, for services rendered in the bacteriological department of the health department of the state of Idaho. This would be a physical impossibility, for the reason, as above stated, he did not have the custody, control, or power to disburse public moneys. In drawing a warrant in favor of the claimant Wallis, he merely acted in a ministerial capacity.

It is not contended that the claim presented against the state was not a lawful claim authorized by law. It further appears that the claim was properly presented to the state board of examiners; that it was audited and allowed; that the auditor was directed by said board to draw a warrant in favor of the

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claimant in full payment for the services rendered, as appeared upon the face of the claim presented to the state board of examiners and by said board allowed. The state board of examiners, under the law and the constitution, has the sole and absolute discretion in passing upon what are and what are not valid and proper charges against the state. A writ of *mandamus* will not lie to compel said board to act favorably or unfavorably upon a claim so presented. Neither will a writ of prohibition issue to restrain said board from allowing or disallowing a claim against the state. Under the law, it is incumbent upon a claimant to submit in proper form a claim against the state, accompanied by original vouchers or receipts of any evidence of indebtedness against the state. After a claim has been submitted to the state board of examiners as provided by law and the same has been examined, audited and allowed and the auditor directed to draw a warrant in favor of the claimant, in the absence of collusion, theft or actual fraud upon the part of the claimant and the auditor, or the claimant and the state board of examiners, although a mistake is made by the auditor in drawing said warrant upon the wrong fund or item in the same department, resort should be had to the civil rather than the criminal law, as provided by sec. 145i, chapter 15, Sess. Laws 1913, p. 57, which reads: "For the proper performance of the duties herein enjoined upon the state auditor, as secretary of the state board of examiners, or for any unlawful or irregular payment of any account submitted against the state, the state auditor is hereby made responsible upon his official bond."

It seems to us that it would be both cruel and inhuman to incarcerate a public official in the state penitentiary or to visit upon him the disgrace and humiliation of an indictment and trial, who, while acting in a ministerial capacity and under the direction of a properly constituted board—whose duty it is to audit, examine and allow claims against the state—drew a state warrant upon the wrong item in an appropriation for the maintenance of a department or an integral part thereof. There is no single question which has so often taxed the patience and industry of the courts as the question of deciding

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just where and when "authority of law" does or does not exist. In deciding this question, courts and others learned in the law often disagree and are sometimes mistaken. The state auditor is not supposed to be an officer learned in the law, yet he is charged with the responsibility of deciding whether "authority of law" exists for paying a given claim out of a given fund; or, what amounts to the same thing, he must decide, in the first instance, whether there is any "authority of law" to make a given claim a charge against the state, and he must then determine out of which fund, under "authority of law," the claim may be paid. It never was the intent of the law to hold the state auditor, or any other public official, criminally responsible under a severe penalty, for a mistake in judgment when presenting or allowing a claim against the state, or for a failure to be always right in his decisions, in the absence of actual fraud, theft, conspiracy to cheat, or some felonious and unlawful attempt to deprive the state of its public moneys. Even the most learned and able judge might well shrink from accepting the responsibility of at all times being absolutely right in determining when a given claim is within or without "authority of law."

In the case of the *United States v. Elvina*, 24 Philippine Rep. 230, the court says: "One who has actually paid out the public funds in good faith to persons who have rendered services to the municipality of which he is treasurer, and under and in accordance with resolutions of the municipal council authorizing him to make such payments, is not guilty of the crime of misappropriation of public funds, although such payments may have been made in violation of law.

"Where the money alleged to have been misappropriated was paid out in the interest and for the benefit of the municipality, in good faith and in the honest belief that it was his duty as municipal treasurer to make such payment, such funds so paid out are not criminally misappropriated, although they may have been paid out on insufficient vouchers or improper evidence.

"Where a municipal treasurer makes an honest mistake as to the law or to the facts concerning his duties relative to the

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expenditure of public funds, and actually and in good faith pays out such funds under such mistake, he is not guilty of the crime of misappropriation of public funds, although he may be civilly liable to reimburse the municipality."

In this proceeding, the only question to be determined is the legality of the restraint under which the petitioner is held, and in view of the conclusions that have been reached in this case, we do not feel called upon to further construe sec. 6975, Rev. Codes, or the provisions of the general appropriation act passed by the 1913 legislature, Sess. Laws 1913, p. 637.

Having decided that the facts alleged in the indictment do not state a public offense against the petitioner, it follows that the petitioner must be discharged, and it is so ordered.

Sullivan, C. J., concurs.

MORGAN, J., Dissenting.—I find myself so completely out of accord with the majority of the court that a dissenting opinion will be necessary.

While the facts stated in the majority opinion are correct in most particulars, it may be well, in the interest of complete accuracy, to say that Robert Wallis did not present his claim to the head of the department in which he was employed, to wit, the bacteriological department of the health department, but that he did present it to, and it was certified to be correct by James H. Wallis, who was the head of the dairy, food and sanitary department, from the traveling expense fund of which the said claim for salary was paid, and that the said dairy, food and sanitary department is an entirely separate and distinct branch of the health department from the bacteriological department in which he was employed; also that each of these subdepartments of said health department was given separate and distinct appropriations for its maintenance by chap. 193 of the Sess. Laws of 1913.

It is the contention of the county attorney of Ada county, who appeared for the state in this case, that there was no authority of law for the payment of said claim out of the

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dairy, food and sanitary department appropriation for services rendered in the bacteriological department of the health department, and, second, that it was improperly paid from the traveling expense fund of said dairy, food and sanitary department, since the payment was made for services rendered and was in the nature of a salary and could, by no stretch of the imagination, be included within an item of traveling expense, and that, therefore, the petitioner, an officer of this state charged with the safekeeping, transfer and disbursement of public moneys by issuing his warrant against said fund in payment of said claim appropriated \$90 thereof without authority of law to the use of said Robert Wallis.

An examination of said chap. 193, Sess. Laws 1913, pp. 643 and 644, will disclose the different funds appropriated by the legislature for the maintenance of the health department, and among them will be found to be the following:

State Dairy, Food and Sanitary Department.

Salaries	\$25,500
Traveling expenses	10,000
General expenses	4,500

Total.....\$40,000

In order to fully understand the situation presented by the facts in this case it may be well to briefly refer to some fundamental principles of law.

In common with the other states of the Union, Idaho has adopted a form of government consisting of three co-ordinate branches, each supreme in its own particular sphere. Art. 2 of our constitution is as follows:

“The powers of the government of this state are divided into three distinct departments; the legislative, executive and judicial, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of these departments shall exercise any power properly belonging to

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either of the others, except as in this constitution expressly directed or permitted.”

Sec. 13 of art. 7 of the constitution is as follows:

“No money shall be drawn from the treasury but in pursuance of appropriations made by law.”

Counsel for the state has, for our guidance, cited a number of decisions defining the word “appropriation,” and it may be said that the following, in the light of all the authorities examined upon the subject, is a correct definition of the term:

“An appropriation, within the meaning of sec. 13, art. 7, of our constitution, is authority from the legislature, expressly given in legal form, to the proper officers to pay from the public moneys a specified sum, and no more, for a specified purpose, and no other.”

It follows that no money may lawfully be paid from the treasury except pursuant to and in accordance with an act of the legislature, expressly appropriating it to the specific purpose for which it is paid. (See *Kingsbury v. Anderson*, 5 Ida. 771, 51 Pac. 744; *Jeffreys v. Huston*, 23 Ida. 372, 129 Pac. 1065; *McPherson v. Huston*, 24 Ida. 21, 132 Pac. 107; *Falk v. Huston*, 25 Ida. 26, 135 Pac. 745.)

Conforming to the duty enjoined upon it and pursuant to the authority vested in it, and in it alone, by the constitution, the twelfth session of the Idaho legislature, by said chap. 193, made appropriation of public moneys of the state of Idaho for the maintenance of the dairy, food and sanitary department as above stated. In order to safeguard the moneys of the state separate funds were created and, as above indicated, for the dairy, food and sanitary department there were created three funds, being a salary fund, traveling expense fund and a fund for general expenses. By reason of the peculiar duties devolving upon said department it must be manifest that, while the legislature could compute with accuracy the amount of money necessary to be appropriated to pay salaries, it could not accurately estimate the amount necessary to be paid for traveling expenses during the two years for which the appropriation was made. No man could

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foresee the contingencies that might arise requiring the commissioner and his deputies to make trips over the state in the discharge of their duties; therefore, the legislature could and did appropriate just sufficient money, and no more, to pay salaries, but made an exceedingly liberal appropriation for the payment of traveling expenses so as to meet such emergencies as might or might not arise during the ensuing two years.

It will be observed that with a view to safeguarding the funds of the state so appropriated, the necessity for the expenditure of which might or might not arise, the appropriation was made in the following language:

"That the following sums of money, or so much thereof as may be necessary, are hereby appropriated for the payment of salaries and compensation of the state officers and employees of the state of Idaho and the general expenses of the state government, and for the support and maintenance of the several state institutions for the period commencing on the first Monday in January, 1913, and ending on the first Monday of January, 1915. The sums hereinafter appropriated shall be paid out by the state treasurer only upon warrants drawn by the state auditor against the general fund of the state. That the amounts specifically appropriated for stated purposes by this act constitute the only amount appropriated, and to be used for any purposes during the years 1913-14." (Sess. Laws 1913, p. 638.)

Under our system of finance any moneys appropriated by the legislature for a specific purpose and not used for that purpose, at the end of the time for which it was appropriated, automatically lapses back and again becomes a part of the unappropriated public moneys of Idaho. Any portion of the \$10,000 appropriated as a traveling expense fund for the use of the dairy, food and sanitary department during the biennial period of 1913-14, which was not used for that purpose and which was not misappropriated by the public officials, on the first Monday of January, 1915, became again unappropriated public moneys of the state. It must be apparent, then, that the acts of the petitioner here in issuing his

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warrant in favor of Robert Wallis against the traveling expense fund of the dairy, food and sanitary department, in payment of a salary claim for services rendered in the bacteriological laboratory of the board of health, thereby procuring to be expended moneys from said fund for a purpose other than that for which the fund was created by the legislature, with the result that the moneys represented thereby did not revert to the general fund, amounted to a misappropriation of the public moneys of Idaho.

It has been stated in the majority opinion in this case that "the state lost no money, but that an honest, valid obligation, lawfully incurred, was paid by the issuance of the warrant in question." While it is entirely immaterial whether the state lost money or not, since that is not one of the elements of the crime charged, I do not so find. An examination of said chap. 193 convinces me to the contrary. The only appropriations of moneys made for the bacteriological department are: "Maintenance of laboratory, \$2,000. Bacteriologist, \$4,800," and I am taking it for granted that the words "maintenance of laboratory" refer to the bacteriological laboratory.

It is assumed that if the legislature had intended that Robert Wallis, or anyone else except the bacteriologist, was to be employed in the laboratory at the expense of the state, it would have made appropriation of money for the payment of his salary; no such appropriation having been made, the following language quoted from sec. 6 of said chap. 193, becomes strikingly applicable: "That no officer, employee, or state board of this state, or board of regents, or board of trustees of any institution in this state, or any member, employee or agent thereof, shall enter into any contract or agreement creating any expense, or incurring any liability, moral, legal or otherwise, or at all in excess of the appropriations made by law for the specific purposes for which such expenditure is to be made, or liability incurred, unless written authority to make such expenditure or to incur such liability has been previously obtained from the state board of examiners of the state of Idaho. Any person or persons violating the provi-

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sions of this act shall be deemed guilty of a misdemeanor and shall be subject to removal from the position held, by order of the Governor of the state of Idaho. *Any indebtedness attempted to be created against the state in violation of the provisions of this act or any indebtedness attempted to be created against the state in excess of the appropriations provided for in any act shall be void.*"

It is not contended that any authority to employ Robert Wallis in the bacteriological laboratory was procured from the state board of examiners, and since no money was appropriated by the legislature with which to pay for his services therein, his claim against the state was void and was not "an honest, valid obligation, lawfully incurred," and when it was paid by the issuance of the warrant in question the state lost the money represented by it, the opinion of the majority of this court to the contrary notwithstanding.

The statute, for violation of which the indictment here under consideration was found, is as quoted in the majority opinion, but I am unable to agree that any of the subdivisions of said sec. 6975 are to be construed by any other rule of statutory interpretation than that applicable to the other subdivisions. It is said in the majority opinion that some acts mentioned in said section are clearly *mala prohibita*, and, as appears to my mind, all of the acts mentioned in said section are *mala prohibita*.

In the case of *State v. Browne*, 4 Ida. 723, 44 Pac. 552, cited in the majority opinion, the defendants were charged with a violation of sec. 6975, Rev. Codes, substantially in the language of subdivision 4 thereof, just as the petitioner is charged with a violation of said section substantially in the language of subdivision 1 thereof. In order that there may be no misunderstanding about that opinion and its correct application to this case, the part of it which refers to sec. 6975 of the Codes will be quoted at length, adopted and made a part of this dissenting opinion. It is as follows:

"The next, and we believe the only other, question raised by this record, is in regard to the following instruction: 'You must go further, and find, from the evidence, beyond all

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reasonable doubt, that in making said contract, and in making and receiving said deposit, the defendant and Gilstrap had a corrupt, fraudulent and felonious intent to cheat and defraud Latah county out of its money or property, or some part thereof.' That the district court, in giving this instruction, entirely lost sight, not only of the limitation which both the constitution and the laws placed upon judicial functions, but overlooked or abrogated both the letter and the clear purpose of the statute upon which the indictment was based, is apparent. The statute for the violation of which defendant was indicted makes it a penal offense for any of the officers enumerated therein to deposit any public moneys, with the receipt, safekeeping, transfer or disbursement of which such officer is charged, 'in any bank, or with any banker or other person, otherwise than on special deposit.' Under the construction given by the district court to this statute in the instruction above cited, the statute is to all intents and purposes nullified both in letter and in spirit. It may be assumed that, at the time the defendants entered into the contract, they, nor either of them, had any intention of corruptly, fraudulently or feloniously cheating, wronging, or defrauding Latah county out of its money or property, or any part thereof. Nor was it essential or necessary to the establishment of their guilt under the indictment, that any such intent on their part should either be alleged, proven or found by the jury. No such language as that contained in the instruction is found in the statute, nor is any such intent made by statute, nor can it be made, by any recognized legal rules of construction, an essential element of the crime defined in the statute. The statute is preventive. It contains ten subdivisions, specifically defining the acts which officers charged with the care and disbursement of the public funds are prohibited from doing, and the doing of either by such officer is punishable as a felony. If the obligations imposed upon this class of officers by the statute are onerous, or not in accordance with what business men conceive to be the best interest of the public, they should secure its repeal, or else care should be taken not to bring their consideration before the courts. It

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is the duty of the court to construe the law as it is, not as some would like to have it. To protect the revenues of the state, certain laws have been enacted. These laws are preventive in their character, but they are none the less obligatory. If the courts can assume to say that the evil which the law was intended to prevent was never contemplated by the accused, when he violated the express provisions of the law, and therefore he is not amenable, we might as well do away with the legislative branch of the government, and rely entirely upon 'judge-made law.' It should seem as though the legislature of our state had done their full duty in enacting statutes for the protection of the revenues of the state, and yet defalcations and misfeasance of public officers would almost appear to be the rule. If it were exactly known what percentage of our taxation arises from the defalcation of officers and the misappropriation of the public funds, and to what extent the public interest is sacrificed to private greed, it might not be so difficult to account for the 'hard times' and high taxes of which all are complaining."

The majority of the court has not favored us with any reason, and it may be said with confidence that none exists, why one rule of interpretation should be applied to said sec. 6975 when the act complained of is a violation of subdivision 4, and consisted of placing moneys of a county on general deposit in a bank, and another rule of interpretation should be used when the act complained of is a violation of subdivision 1 of said section and consisted of misappropriating the moneys of the state in payment of a void claim for salary out of the fund created by law for the payment of traveling expenses to be incurred in a department other than the one in which the claimant was employed.

The majority opinion decides that the state auditor is not an officer charged with the receipt, safekeeping, transfer or disbursement of public moneys, and is, therefore, incapable of committing the crime charged in the indictment.

It will be observed that the statute under consideration expressly prohibits "each officer of this state, or of any county, city, town, or district of this state, and every other

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person charged with the receipt, safekeeping, transfer or disbursement of public moneys" from doing the acts in said section mentioned. It may be well contended that any officer of this state, or any county, city, town or district of this state, whether charged with the receipt, safekeeping, transfer or disbursement of public moneys or not, and every other person who is charged with any or all of said duties may commit the crime described in said section, and the plain language of the statute seems to fully justify the construction. But assuming that only those officers who are charged with the receipt, safekeeping, transfer or disbursement of public moneys may violate this law, it appears to my mind to be perfectly clear that the state auditor is one of the officers so contemplated.

By the act of the twelfth session of the legislature, Sess. Laws 1913, chap. 15, pp. 54 to 58, from which the majority of the court quotes in support of its conclusion, it is made the duty of the state auditor to certify with respect to claims against the state submitted to the state board of examiners "that the account is in proper form, that the totals given thereon are correct, that receipted vouchers, showing the payment of all items for which reimbursement is asked are submitted therewith, and that there are funds in the state treasury out of which the same may lawfully be paid." Upon the claim of Robert Wallis here under consideration, which shows upon its face that it was a claim for services rendered while said Wallis was employed in the bacteriological laboratory, the following indorsement was made by the petitioner as state auditor: "I certify that the above account has been audited and found correct. That there is authority of law for its payment, and that there is sufficient money in the proper fund for its payment," and then, after said claim had been passed upon by the state board of examiners, he drew his warrant upon the traveling expense fund of the state dairy, food and sanitary department in payment of the claim.

It is perfectly clear that no money may legally be disbursed from the public treasury except upon the presentation of the auditor's warrant and, as has been suggested by counsel for

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the state in this case, the warrant of the auditor, in the disbursement of public funds, is to be considered in a like sense and light as the check of an individual in the disbursement of his private funds from a bank. That the state auditor is an official charged with the disbursement of public funds and was so intended to be by the legislature, is made entirely clear by sec. 145i of said chap. 15, Sess. Laws 1913, as follows: "For the proper performance of the duties herein enjoined upon the state auditor, as secretary of the state board of examiners, or for any unlawful or irregular payment of any account submitted against the state, the state auditor is hereby made responsible upon his official bond."

It will be observed that the majority of the court also quotes this section in support of its conclusion, and suggests that a civil remedy has been provided for the wrongful disbursement of public funds. The answer to such contention suggests itself. While a civil remedy has been thus provided, it is not an exclusive remedy any more than is the civil remedy by way of suit upon the bond of any public officer for embezzlement of public funds an exclusive remedy.

Said sec. 145i does, however, provide which officer's bond shall be liable for any unlawful or irregular payment of any account submitted against the state, and that officer is the state auditor. To contend that the state auditor is not a disbursing officer, but that his bond shall be liable for an unlawful or irregular disbursement of public moneys, is inconsistent.

The majority opinion a little further on states the truth of the matter when it says "he is but one of several whose combined acts are absolutely necessary to ultimately bring about a disbursement of the public moneys." Being one of the persons whose acts "are absolutely necessary to ultimately bring about the disbursement of public moneys," he is one of the persons contemplated by sec. 6975, wherein it says: "Every officer of this state . . . charged with the . . . disbursement of public moneys who . . . without authority of law, appropriates the same or any portion thereof to . . . the use of another . . . is punishable by imprisonment in the

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state prison for not less than one nor more than ten years, and is disqualified for holding any office in this state."

The conclusion reached by the court that "sec. 6975 Rev. Codes, was aimed at the crime of embezzlement and against a particular class of persons who fraudulently appropriate to their own use, or to the use of others, not in the due and lawful execution of their trust, any property which comes into their possession or under their control by virtue of the official position which they hold or in violation of a trust," is not sound. There are ten subdivisions of said section, not one of which makes any reference to the crime of embezzlement or fraudulent appropriation of property. Sec. 7065, Rev. Codes, defines embezzlement as follows: "Embezzlement is the fraudulent appropriation of property by a person to whom it has been entrusted." Sec. 7066 relates to embezzlement by public and corporate officers and is as follows:

"Every officer of this state, or of any county, city, or other municipal corporation or subdivision thereof, and every deputy, clerk, or servant of any such officer, and every officer, director, trustee, clerk, servant, or agent of any association, society, or corporation (public or private), who fraudulently appropriates to any use or purpose not in the due and lawful execution of his trust, any property which he has in his possession or under his control by virtue of his trust, or secretes it with a fraudulent intent to appropriate it to such use or purpose, is guilty of embezzlement."

It is impossible to imagine what necessity could have existed for the enactment of sec. 6975, if it was intended as an embezzlement statute, in view of the provisions of sec. 7066 above quoted. It is impossible to imagine, if the legislature intended sec. 6975 to be a law against the crime of embezzlement, why the word "fraudulent" was not used in order to bring the acts therein declared against within the definition of embezzlement as stated in sec. 7065. The correct conclusion to be reached is that said sec. 6975 was intended to mean exactly what it says, and was enacted for the purpose of the better protection of public moneys and to keep them from be-

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ing carelessly or dishonestly dealt with under circumstances not amounting to embezzlement.

It is not to be understood that said section may be violated accidentally, inadvertently or innocently, as is suggested by the language of the majority opinion, but if violated at all it must be done wilfully, unlawfully and feloniously, as charged in the indictment in this case. Sec. 6975 must be read and construed in the light of sec. 6314, Rev. Codes, which is as follows: "In every crime or public offense there must exist a union, or joint operation, of act and intent, or criminal negligence."

Had this case been permitted to go to trial to a jury there can be no doubt that if the state failed to prove the petitioner guilty of having knowingly, wilfully and intentionally committed the acts complained of or that their commission was due to his criminal negligence, under a proper instruction a jury would have promptly returned a verdict of not guilty, and it would be the duty of this court to reverse a judgment of conviction unless it appeared that the acts charged in the indictment were so knowingly, voluntarily and purposely or negligently committed.

It must be borne in mind, however, that we are passing upon the sufficiency of an indictment which charges the acts to have been wilfully, unlawfully and feloniously committed. I am of the opinion said indictment charges the petitioner with the commission of a crime and that his petition for a writ of *habeas corpus* should be denied.

Argument for Appellant.

(April 23, 1915.)

VINCENT F. LORANG, Respondent, v. L. R. RANDALL,
Appellant.

[148 Pac. 468.]

DAMAGES—PERSONAL INJURIES—VERDICT—SUFFICIENCY OF—NONSUIT—
COMPLAINT—AMENDMENT OF—INSTRUCTIONS.

1. *Held*, that the evidence is sufficient to support the verdict, and that the court did not err in overruling appellant's motion for a nonsuit.

2. Where the court allows an amendment to the complaint and thereafter offers to continue the case at the cost of the plaintiff, and the defendant indicates that he does not desire the case continued, *held*, that the court did not err in permitting the amendment.

3. *Held*, that the instructions given by the court fairly cover the case, and were applicable to the evidence.

APPEAL from the District Court of the Second Judicial District for Lewis County. Hon. Edgar C. Steele, Judge.

Action to recover for personal injuries. Judgment for plaintiff. *Affirmed*.

G. W. Tannahill, for Appellant.

From the evidence it appears that Lorang was the aggressor—not only in attempting to ride his horse over Randall, but also in attempting to drive from the corral a heifer which did not belong to him; that he was engaged in an unlawful act or undertaking at the time.

“A party who acts in defiance of law has no just claims to its agency in obtaining redress for the damage he may have sustained in the course of his illegal transactions.” (Beach on Contributory Negligence, sec. 47; Cooley on Torts, 2d ed.. 151; *Dover v. Knauer*, 84 Ill. App. 184; *Wallace v. Cannon*, 38 Ga. 199; 95 Am. Dec. 385; *Sprague v. Rooney*, 104 Mo. 349, 358, 16 S. W. 505, 508.)

No action will lie to cover a demand or a supposed claim for damages if to establish it the plaintiff requires aid from

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an illegal transaction. (*Welch v. Wesson*, 6 Gray (Mass.), 505; *Gregg v. Wyman*, 4 Cush. (Mass.) 322.)

“Force, if not excessive, is justified when employed in necessary defense of the possession of property, either real or personal, against the aggressions of an individual, or of an animal.” (38 Cyc. 532.)

F. E. Fogg, for Respondent, cites no authorities.

SULLIVAN, C. J.—This action was commenced to recover damages for personal injuries alleged to have been caused by the appellant's jerking the respondent's horse, causing the horse to rear and fall upon the respondent. The appellant denied the material allegations of the complaint and filed his cross-complaint, alleging damages by reason of the respondent's riding his horse wilfully and maliciously and without cause against the body of the appellant.

The cause was tried by the court with a jury and a verdict and judgment rendered and given in favor of the respondent, awarding him damages in the sum of \$250 with costs. A motion for a new trial was denied and the appeal is from the judgment and order denying a new trial.

The appellant assigns several errors involving the sufficiency of the evidence to support the verdict, overruling and denying appellant's motion for a nonsuit, and errors of law occurring at the trial. The principal error involves the sufficiency of the evidence to sustain the verdict.

It is contended by counsel for appellant that the respondent was a trespasser at the time he received the injuries; that he had been ordered by the appellant not to attempt to take the heifer from a certain corral, which was involved in the controversy, for the reason, as claimed by the appellant, that the respondent did not own her, and notwithstanding he was ordered not to take her, he insisted upon riding into the corral and attempting to drive said heifer out, and it is contended that in his attempt to do that he rode his horse on to appellant and in appellant's effort to protect himself the horse was

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thrown and in that manner the respondent received whatever injuries he sustained.

A number of witnesses testified for the plaintiff and defendant on the trial of the case, and there is a very substantial conflict in the evidence as to just what occurred shortly before and at the time of the appellant's catching the horse by the bridle and jerking him and the horse's rearing and falling over backward on the respondent.

We have examined the evidence very carefully and have concluded that there is substantial evidence in the record to support the verdict, and have also concluded that the court did not err in overruling appellant's motion for a nonsuit and also in denying appellant's motion for a new trial.

Some question is raised in regard to the action of the court during the trial in permitting the plaintiff to amend his complaint by setting forth the items consisting of medical attendance and the loss he sustained by not being able to attend to his business, etc. After allowing said amendment the court informed counsel for appellant that if he desired a continuance of the case in order to meet the allegations of the complaint as amended, the court would grant him such continuance at the cost of the plaintiff; but counsel for appellant indicated his willingness to proceed with the trial of the case and did not insist on a continuance. Those being the facts, the court did not err in permitting said amendment.

The instructions given by the court fairly cover the case, and the jury thereby was instructed that in order for the plaintiff to recover it was necessary for him to show as one of the facts that he himself was not guilty of any wilful or negligent acts which contributed in any degree to the injury, and that the evidence must show that the injury was caused by the wilful or negligent act of the defendant Randall and not for the purpose of preventing injury to himself. The instructions clearly cover the case on the theory on which it was tried.

In his cross-complaint the defendant claimed damages in the sum of \$1,000 against the plaintiff because of the alleged attempt to ride his horse over him, and offered evidence to show that the plaintiff undertook to ride his horse over him

Points Decided.

and that defendant's seizing the horse by the bridle and jerking it, as he did, was done to protect himself from injury. There was considerable evidence introduced on both sides in regard to this question, and there is substantial conflict therein, and it was for the jury to determine which one of the parties was at fault in the matter, which they did by returning a verdict in favor of the plaintiff.

Finding no reversible error in the record, the judgment must be affirmed, and it is so ordered, with costs in favor of the respondent.

Budge and Morgan, JJ., concur.

(April 24, 1915.)

STATE, Respondent, v. SAMUEL TILDEN, Appellant.

[147 Pac. 1056.]

INDIAN RESERVATION—RAILROAD RIGHT OF WAY—INDIAN TITLE EXTINGUISHED—HOMICIDE—JURISDICTION—NEWSPAPER REPORTS—INTRODUCTION INTO JURY-ROOM—INTOXICATION OF WITNESS—CROSS-EXAMINATION.

1. At a time prior to the date of the treaty between the United States and the Nez Perce Indians wherein it was agreed that the United States would, for a period of 25 years, prohibit the introduction of intoxicating liquors into the country then embraced within the boundaries of the Nez Perce Indian reservation, the government, by act of Congress, granted a railway right of way through said reservation, and it was provided in said act that the compensation to be paid to the Indians for said right of way should be fixed by the Secretary of the Interior, agreed to by the Indians, and paid before any right under said act should accrue to the railway company. *Held*, that the Indian title to the land embraced within the right of way was extinguished prior to the date of the treaty and that the land included therein was not "Indian country."

2. The appellant, a Nez Perce Indian policeman, pursuant to instruction from his superior officer, went upon said right of way

Points Decided.

at a point where it crosses the former Nez Perce Indian reservation, in order to search other Nez Perce Indians suspected of having intoxicating liquors in their possession, and while there, in an encounter with one of said Indians, shot and killed him. *Held*, that the state courts, and not the federal courts, have jurisdiction to try appellant for such homicide.

3. In this case the court ordered that if any daily newspapers were given to the jurors during the course of the trial any report of the proceedings of the trial therein contained should be cut from such papers or that the members of the jury should not read such report. It appears that during the trial a certain daily newspaper published a purported report of said proceedings including a purported dying declaration of the deceased, which, so far as is disclosed in the record, was never made. Although the order of the court excluding such newspaper report from the jury does not appear in the reporter's transcript, it does appear from an affidavit which was incorporated in the bill of exceptions and statement of the case upon motion for a new trial which was stipulated by counsel for both parties to be true and correct and which was settled and allowed as such by the trial court. *Held*, that said matter of the introduction of said newspapers into the jury-room is properly before this court for consideration upon appeal from the order overruling and denying the motion for a new trial.

4. If the bailiff cut the articles complained of from the newspapers before they were given to the jurors or if no member of the jury read said articles, it was incumbent upon counsel for the respondent to show such fact in opposition to the motion for a new trial and the failure so to do raises a presumption that the newspapers, containing such articles, got into the possession of the jury and were read by its members.

5. Upon a showing made by appellant that the jury was permitted to read said newspapers, in the absence of a showing upon the part of respondent that the articles complained of had been cut therefrom or that none of the jury read said articles, the court should have arrested the judgment and granted a new trial.

6. It is proper upon cross-examination to inquire of a witness to an encounter as to any facts showing his ability or lack of ability, to properly observe, clearly understand, remember and relate what took place and, under the circumstances in this case, it was error for the court to prevent the appellant from inquiring of a witness, on cross-examination, as to whether he had been drinking on the evening of the homicide.

Argument for Appellant.

APPEAL from the District Court of the Second Judicial District for the County of Nez Perce. Hon. Edgar C. Steele, Judge.

Appellant was charged with murder and convicted of manslaughter. Judgment reversed.

McNamee & Harn and J. L. McClear, for Appellant.

"In criminal cases, and especially in capital felonies, where members of the jury are permitted to read editorial comments unfavorable to the accused, a new trial ought always to be granted." (Thompson and Merriam on Juries, sec. 531, p. 413, note and authorities cited; *People v. Murray*, 85 Cal. 350, 24 Pac. 666; *Farrer v. State*, 2 Ohio St. 54; *Walker and Black v. State*, 37 Tex. 366; *Hare v. State*, 4 How. (Miss.) 187.)

If the state had refuted the statements contained in defendant's affidavits in support of motion for new trial by all the other jurors except Le Clair, which it had an opportunity to do and did not do, then the objection raised by defendant might not be tenable. (*People v. Goldenson*, 76 Cal. 328, 19 Pac. 161; *People v. Williams*, 24 Cal. 31.)

"Where the intention to convey a fee does not appear, as in case of the conveyance of a 'right of way' for the railroad through certain lands, the company takes an easement only." (2 Elliott on Railroads, sec. 398.)

"The grant of a right of way to a railroad company is the grant of an easement merely and the fee to the soil remains in the grantor." (14 Cyc. 1162; 6 Am. & Eng. Ency. 531; Redfield on Railways, pp. 267, 268 (cases cited); *Smith v. Townsend*, 148 U. S. 490, 13 Sup. Ct. 634, 37 L. ed. 533; *Northern Pac. Ry. Co. v. Townsend*, 190 U. S. 267, 23 Sup. Ct. 671, 47 L. ed. 1044.)

The United States has exclusive jurisdiction to enforce liquor laws over the right of way of the Palouse & Spokane Ry. (*State v. Lott*, 21 Ida. 646, 123 Pac. 491; *Dick v. United States*, 208 U. S. 340, 28 Sup. Ct. 399, 52 L. ed. 520.)

The defendant at the date of the alleged shooting and at the date of the death of the deceased was a United States officer in

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the discharge of his duties, and as such is triable only in the United States court. (*In re Waite*, 81 Fed. 359; *Tennessee v. Davis*, 100 U. S. 257, 25 L. ed. 648; *United States v. Lipsett*, 156 Fed. 65; *Ohio v. Thomas*, 173 U. S. 276, 19 Sup. Ct. 453, 43 L. ed. 699.)

J. H. Peterson, Atty. Genl., T. C. Coffin and E. G. Davis, Assts., and Miles S. Johnson, for Respondent.

Since we must presume that the jury did not violate the court's instructions (2 Thompson on Trials, 2d ed., sec. 2616), it is fair to presume that the jury did not read the newspaper report, although they might have read all the rest of the paper; or if this presumption seems too violent, then we can presume that the bailiff, a court officer, performed his duty and culled from these papers all reference to the trial of the defendant. (*United States v. McKee*, 3 Cent. Law J. 258, Fed. Cas. No. 15,683; *United States v. Reid and Clements*, 53 U. S. (12 How.) 361-366, 13 L. ed. 1023-1025; *People v. Gaffney*, 14 Abb. Pr., N. S. (N. Y.), 36; *Mattox v. United States*, 146 U. S. 140, 13 Sup. Ct. 50, 36 L. ed. 917; *State v. Cucuel*, 31 N. J. L. 249, 263.)

The case of *Dick v. United States*, 208 U. S. 340, 28 Sup. Ct. 399, 52 L. ed. 520, involved merely the question as to whether the introduction of liquor and the sale thereof to an Indian in Culdesac, which is within the exterior boundaries of the Nez Perce Indian reservation, was a violation of sec. 2139, as being "Indian country" within the terms of the treaty between the Nez Perce Indians and the United States. The question of the territorial jurisdiction of Indian police was not there passed upon nor considered. An Indian police has no authority to arrest without a warrant, except for a misdemeanor committed in his presence. (*John Bad Elk v. United States*, 177 U. S. 529, 20 Sup. Ct. 729, 44 L. ed. 874.)

MORGAN, J.—On the evening of May 6, 1914, the appellant, a Nez Perce Indian policeman, together with some other Indian policemen, under the direction of Theodore Sharp,

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Esq., superintendent of the Nez Perce Indian school at Lapwai, Idaho, went to Joseph, a station on the Northern Pacific railway, at a point where said railway, which was formerly the Palouse & Spokane railway, crosses the former Nez Perce Indian reservation, for the purpose of intercepting certain other Nez Perce Indians who were returning from Pullman, Washington, where they had gone to play baseball, and for the purpose of making search of said Indians and their baggage to ascertain if they had any intoxicating liquor in their possession, and with a view to preventing the introduction of such liquor upon former Nez Perce Indian reservation, if any was found; and with the further intention of arresting any of said Indians who might be found to be violating the laws of the United States prohibiting the introduction of such liquor into the Indian country. While at the station, the appellant had an encounter with one William Jackson, a Nez Perce Indian, who had accompanied said baseball players, in which the appellant shot the said Jackson and inflicted a wound upon him from the effects of which the said Jackson, on May 8, 1914, died. The point at which the homicide occurred was upon said railway right of way.

The defendant was arrested by the state authorities, and a trial upon a charge of murder preferred against him by the prosecuting attorney of Nez Perce county resulted in his conviction of the crime of manslaughter, from which judgment of conviction and from the order of the court overruling his motion for a new trial he has appealed to this court.

A number of assignments of error have been made on behalf of the appellant by his counsel in support of these appeals, which have been grouped in his brief and have been argued under five points, or subdivisions, wherein it is contended that the court, erred as follows:

1. In permitting copies of a certain newspaper to be given to and read by the members of the trial jury, which said copies, it is contended, contained matter prejudicial to the rights of the defendant;

2. (a) In refusing to quash the information; (b) refusing to advise the jury, at the conclusion of respondent's testimony,

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to acquit the appellant: (c) overruling appellant's motion in arrest of judgment; (d) holding that the trial court had jurisdiction to try appellant on the charge set out in the information.

3. In giving to the jury instructions which the court gave;

4. In refusing to give the jury appellant's requested instructions numbers 1, 3, 4, 5, 6 and 7;

5. Insufficiency of the evidence to support the verdict of the jury or the judgment or sentence of the court.

We will first consider the specifications of error relied upon and urged by the appellant attacking the jurisdiction of the court, which are embraced in the foregoing subdivisions, numbered 2, 3, 4 and 5.

A number of authorities are cited and relied upon by appellant in support of his contention that the federal courts, and not the state courts, have jurisdiction of the crime charged in the information, among which the case of *Dick v. United States*, 208 U. S. 340, 28 Sup. Ct. 399, 52 L. ed. 520, may be said to be most directly in point.

The opinion in case of *Clairmont v. United States*, 225 U. S. 551, 32 Sup. Ct. 787, 56 L. ed. 1201, which arose from a state of facts similar to those here under consideration, discusses the said case of *Dick v. United States*, and distinguishes it from cases of this kind. We will consider said cases together.

In case of *Dick v. United States*, *supra*, it was held that under a treaty with the Nez Perce tribe of Indians, which was agreed to between the Indians and the agents of the government on May 1, 1893, the United States retained jurisdiction for the purpose of prohibiting the introduction of intoxicating liquors into the territory then comprising the Nez Perce Indian reservation. The part of the treaty relating to the prohibition of the introduction of such liquors is to be found in art. 9 of said treaty, 28 Stat. at L. 330, and is as follows:

"It is further agreed that the lands by this agreement ceded, those retained, and those allotted to said Nez Perce Indians shall be subject, for a period of twenty-five years, to all the laws of the United States prohibiting the introduction of intoxicants into the Indian country. . . . "

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The facts in the case of *Dick v. United States* are that said Dick was arrested with intoxicating liquors in his possession in Culdesac, a village located under the United States townsite laws within the outside boundaries of the territory, which was formerly the Nez Perce Indian reservation, at a time subsequent to the date said treaty was agreed to and subsequent to its approval by Congress. The segregation or location under said townsite laws was made after the consummation of the treaty above referred to.

The case of *Clairmont v. United States, supra*, decides that a railroad right of way across the Flathead Indian reservation in Montana is not a part of the said reservation in contemplation of the act of Congress of January 30, 1897 (29 Stat. at L. 506, U. S. Comp. St. 1913, sec. 4137, 3 Fed. St. Ann. 384, 385), prohibiting the introduction of intoxicating liquors into the Indian country, for the reason that the Indian title as to said right of way had been extinguished prior to the adoption of said act.

In the Clairmont case it appears that the government of the United States, by an act of July 2, 1864 (13 Stat. at L. 365-367), granted to the Northern Pacific Railway Company for the construction of a railroad and telegraph line, a right of way through the public lands to the extent of 200 feet in width on each side of said railroad, including all necessary ground for station buildings, workshops, etc., and it was further provided that the United States should "extinguish as rapidly as may be consistent with public policy and the welfare of said Indians, the Indian title to all lands falling under the operation of said act"; that thereafter and on September 2, 1882, an agreement was reached between the United States and the Indians whereby the Indians surrendered and relinquished to the United States all of their right, title and interest to said strip of land granted to the Northern Pacific Railway Company. The opinion in the Clairmont case, commenting upon the Dick case, says: "While the Dick case was thus found, owing to the stipulation in the agreement, to be within the exception, the court explicitly recognized the rule which governs in the absence

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of a different provision by treaty or by act of Congress. The court said: 'If this case depended *alone* upon the federal liquor statute forbidding the introduction of intoxicating drinks into the Indian country, we should feel obliged to adjudge that the trial court erred in not directing a verdict for the defendant; for that statute, when enacted, did not intend by the words 'Indian country' to embrace any body of territory in which, at the time, the Indian title had been extinguished, and over which and over the inhabitants of which (as was the case of Culdesac) the jurisdiction of the state, for all purposes of government, was full and complete. (*Bates v. Clark*, 95 U. S. 204, 24 L. ed. 471; *Ex parte Crow Dog* (*Ex parte Kang-Gi-Shun-Ca*), 109 U. S. 556, 561, 3 Sup. Ct. 396, 27 L. ed. 1030, 1032.)

"In the present case there was no provision, either in the treaty with the Indians, or by act of Congress, which limited the effect of the surrender of the Indian title. We have been referred to certain statements made by the representative of the United States in the course of the negotiations with the Indians which preceded their agreement, but these were of an informal character and cannot be regarded as qualifying the agreement that was actually made. The Indian title or right of occupation was extinguished, without reservation; and the relinquished strip came under the jurisdiction of the then territory, and later under that of the state of Montana. It was not 'unappropriated public land' or land 'owned or held by any Indian or Indian tribe.' . . ."

Said opinion concluded as follows: "Our conclusion must be that the right of way had been completely withdrawn from the reservation by the surrender of the Indian title, and that in accordance with the repeated rulings of this court, it was not Indian country. The district court, therefore, had no jurisdiction of the offense charged, and the judgment must be reversed."

In the case at bar, by an act of Congress approved May 8, 1890, 26 Stat. at L., chap. 199, p. 104, which was prior to the treaty with the Nez Perce Indians wherein it was agreed, among other things, that the United States should, for a

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period of 25 years, prohibit the introduction of intoxicating liquors into the country then embraced within the boundaries of the Nez Perce Indian reservation, the government granted to the Palouse & Spokane Railway Company a right of way through the said Nez Perce Indian reservation and included within the right of way the point at which the homicide occurred, for the commission of which the appellant has been convicted of the crime of manslaughter. In said act it is provided: "That it shall be the duty of the Secretary of the Interior to fix the amount of compensation to be paid the Indians for such right of way, and provide the time and manner for the payment thereof, and also to ascertain and fix the amount of compensation to be made individual members of the tribe for damages sustained by them by reason of the construction of said road; but no right of any kind shall vest in said railway company in or to any part of the right of way herein provided for until . . . the compensation aforesaid has been fixed and paid; . . . Provided, that the consent of the Indians to said right of way and compensation shall be obtained by said railway company in such manner as the Secretary of the Interior shall prescribe before any right under this act shall accrue to said company."

Basing our conclusion upon the presumption that the railroad company had complied with the conditions above recited it appears that prior to entering into the treaty with the Nez Perce Indians whereby the United States undertook to prohibit the introduction of intoxicating liquors into the Indian country, as above mentioned, both the United States and the Nez Perce Indians had conveyed the land, upon which the homicide was committed, to the said Palouse & Spokane Railway Company, thereby extinguishing the Indian title, which brings this case in line with that of *Clairmont v. United States*, *supra*, wherein it was decided, as above quoted, that the land included within such right of way was not "Indian country." In the light of this authority we conclude that the homicide described in the information occurred within the jurisdiction of the state of Idaho, and

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not of the United States, and that the state courts have jurisdiction to try the appellant and the federal courts have not.

This court has heretofore decided that the courts of the state of Idaho have jurisdiction to try all criminal cases arising within the former Nez Perce Indian reservation except those pertaining to the introduction of intoxicating liquor into the Indian country. (*State v. Lott*, 21 Ida. 646, 123 Pac. 491.)

There appears in the transcript in this case, in support of the motion of the appellant for a new trial, the affidavit of Clay McNamee, Esq., one of the attorneys for appellant, wherein he states, among other things, that said trial began on the 27th day of November, 1914, and ended about the hour of four o'clock P. M., on December 1, 1914. Said affidavit further recites:

"That on the afternoon of November 27th, 1914, after the jury had been selected to try said cause, one of the jurors, William Nixon, inquired of the judge of the court if the jury, while being kept together and trying said trial, would be allowed to have reading matter; that the court replied to the jury that the members of the jury would be allowed to procure as many magazines or other reading material as they might desire; that at that time affiant objected to any of the daily newspapers being given to the jury during the trial of said cause or during their deliberation on their verdict; that the judge of the said court then stated that if any daily newspapers were allowed to be given to the jurors, that any report concerning the trial of said Samuel Tilden therein contained should be cut out of said papers or that the members of the jury should not read any report contained in said papers of said trial or the proceedings had therein."

Said affiant further states in his affidavit that he has been informed, since the discharge of the jury, that a certain daily newspaper, in said affidavit named, of November 28th and 29th, respectively, to the extent of one or more copies, was allowed to be had by members of the jury; that said paper is published in the city of Lewiston. Accompanying the affidavit is an exhibit alleged to consist of a copy of

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articles purporting to be statements of the proceedings in said trial, together with comments as to the merits of the case, appearing in said newspaper on said dates. These purported newspaper articles will not be here quoted at length, but there has been selected therefrom the following:

“Jackson, who was a very popular young Indian, died the day following the shooting, but made the following statement when it was realized he could not survive:

“‘On May 6, 1914, about 10 o'clock P. M., I, together with Joseph White, Harrison Jabes, Benjamin Wilcox, Charles Rogers, Albert Davis, Calaf Carter, Peter Types and others, was on my way from Pullman, Wash., where we played baseball, and on coming to Joseph, Idaho, one Samuel Tilden, did, without any excuse, shoot me in the side. Without any words and as I passed the said Samuel Tilden he struck me over the head with his gun. At this I tried to take the gun away from him for fear he would shoot someone, and he then shot me in the side. I had no whisky on my person and no one else did that I know of. Samuel Tilden did search all the boys for whisky, but found none, and this I believe is what made him shoot.’

“This statement was corroborated at both the inquest and preliminary examination by numerous witnesses and so Tilden was held for trial on the murder charge.”

Said affiant further states in his affidavit that he is informed and verily believes that different members of the jury read the reports contained in said issues of said paper during the progress of the trial and were thereby biased and prejudiced against said defendant while deliberating upon their verdict in the above-entitled cause.

In support of the motion for a new trial the affidavit of J. V. Le Clair, one of the members of the said jury, was submitted to the court, in which he states; that during the course of the trial the members of said jury, on the 28th and 29th days of November, were permitted by the jury bailiff to have and to read one or more copies of said newspaper.

Counsel for respondent, commenting upon the manner in which this matter is brought before the court, says:

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“First, the record fails to show what order the court made in regard to allowing the jurors to have reading matter and newspapers before them. This hiatus in the record, and which should have been included in the bill of exceptions, is attempted to be remedied by an affidavit of counsel on motion for a new trial. . . . ”

The affidavits and exhibits above mentioned were incorporated in the bill of exceptions, and it was stipulated by the county attorney and counsel for the appellant that the statement of case and bill of exceptions were true and correct, and the said bill of exceptions and statement of the case on motion for a new trial, including the said affidavits and exhibits, were settled and allowed by the trial court on the 24th day of February, 1915. In his order overruling and denying the motion for a new trial the court mentions the matters and papers taken into consideration by him in reaching his conclusion upon said motion, and among the papers so mentioned in said order appear the affidavits in support of the motion for a new trial.

We conclude, therefore, that the matter of the introduction into the jury-room of the said newspapers under the circumstances disclosed in said affidavits is fairly and properly before this court for consideration upon the appeal from the order overruling and denying appellant's motion for a new trial.

It is earnestly urged by counsel for the respondent that the showing made by appellant is insufficient upon this point, in that it has not been shown that any member of the jury read said newspaper article, in violation of the order of the court, or was influenced thereby in reaching a verdict, neither is it shown that the articles were not cut from the papers, in conformity with the order of the court, before they were given to the jury.

Since the court carefully instructed the jury to refrain from reading newspaper reports about the trial, and since he also instructed the bailiff to cut from any newspapers given to the jury such reports, it is very apparent that it would be difficult for counsel for the appellant to procure

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from the members of the jury or the bailiff affidavits that they had violated these orders. It is equally apparent that it would have been an easy matter for counsel for the respondent to procure affidavits that such orders had not been violated, if, in fact, they had not.

It was incumbent upon counsel for the respondent, if the bailiff cut from the said newspapers the articles complained of, to have presented his affidavit, showing that fact, to the trial court in opposition to the motion for a new trial, and it was likewise incumbent upon counsel for the respondent to have presented the affidavits of the members of the jury showing that they had not read the articles complained of if they had not. The failure to do this raises a strong presumption that the newspapers, containing such articles, got into the possession of the jury while it had the case under consideration and that said articles were read by its members.

The law upon this point, as we view it, is clearly stated by Chief Justice Sharkey in the majority opinion of the court in the case of *Hare v. State*, 4 How. (Miss.) 187, as follows:

“To me it seems that the line of distinction is here so clearly drawn, that it is impossible to mistake it, and so fortified by reason as to place it beyond doubt. It is briefly this: If the purity of the verdict *might* have been affected, it must be set aside; if it could not have been affected, it will be sustained.”

If the jury or any member of it, after having been selected and before reaching a verdict in this case, read the articles set forth in the exhibits attached to the affidavit, particularly the one hereinbefore quoted, it clearly appears to our minds that the judgment should have been arrested and a new trial granted. There is absolutely nothing in the record, aside from the newspaper article complained of, to indicate that William Jackson made a dying declaration. The solemnity of a dying declaration is such that juries are greatly impressed by them, and they are permitted to be introduced in evidence only when the foundation therefor

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has been properly laid and are received and considered by the jury only under proper instruction from the court. In this case it does not appear that any dying declaration was made or was used at the coroner's inquest or preliminary examination, although the newspaper article states that one was made and indicates that it was so used and purports to quote it. The foundation for it was not laid, it was not in evidence and the defendant did not receive the protection of a proper instruction from the court to the jury relative to such a dying declaration which the court would have given had one been admitted in evidence.

It is very likely that if said newspaper containing said articles got into the hands of the jurors, the report of the trial upon which they were engaged received their immediate consideration and influenced them greatly to the prejudice of the defendant.

Counsel for respondent in their brief have cited the case of *United States v. McKee*, 3 Cent. Law J. 258, Fed. Cas. No. 15,683, and have quoted therefrom as follows:

"The third ground of the motion for a new trial is in respect to the newspaper article, and in the judgment of both of us, that was an improper article to be published when the jury was about to take the case under consideration, if it was intended it should be read by them. The courts, before they were disabled by act of Congress, treated all articles calculated to influence the result of a pending case, as contempts of their authority, and punished the writers of such articles accordingly. Now, that article cannot be read without showing that there was a bias, at all events, against the defendant. That is undeniable, and if there is good reason to believe that that article had been read by the jury, and had influenced their verdict, if it was shown here conclusively that it had been read by them, we might be obliged, though we would be otherwise satisfied with the verdict, on legal principles, and following established precedents in this regard, to give the defendant a new trial. I make these remarks, because it ought to be understood that all attempts to influence the public mind, and particularly to influence jurors when they

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have a case, civil or criminal, before them, are improper; and, I think, when journalists, respectable journalists, understand this, they will act accordingly. But it is to be remembered in this case that we said to the jury, after having first prohibited the reading of papers: 'You may read papers containing a report of this trial, but you must not read any editorial comments or articles criticising the trial one way or the other.' It is in evidence that this article was published, but there is the affidavit of no juror or other person that it was ever read. Mr. Stevens, the bailiff, testifies that two copies of the paper were bought by the jury, but no witness stated that this article was ever read by a juror. Now, in view of the fact that we had cautioned the jury against reading such articles, and this article disclosed that it was an improper one by the very heading of it, shall we suppose that the jury disregarded their duty without any showing, or must we suppose that they did not? That is a matter that, if it were true, could have been shown by the affidavit of jurors, but there is no such affidavit; and on that ground we think that the motion for a new trial must fail, the same as the others."

The same case is quoted from even at considerable greater length than as above set out in a note to the text in Thompson and Merriam on Juries, p. 413. In said note, immediately following the excerpt quoted and relied upon by counsel for respondent, it is stated:

"This decision, it is believed, cannot be supported either by precedent or on principle. The able and humane judge who rendered it has been censured for mitigating the punishment of McKee to imprisonment in the county jail, instead of the penitentiary; his real fault was that he did not grant him a new trial. The case excited great interest. Reporters were present, representing the daily papers of the principal cities of the Union. A paper owned by the defendant himself was publishing a *verbatim* report of the trial. Under these circumstances, permission given to the jury to read newspaper reports of the trial was an extraordinary indulgence, whether regard be had to the rights of the govern-

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ment or to those of the prisoner. It was scarcely possible that such reports would not exhibit the bias of their authors, and that they would not be accompanied by editorial comments which it would be impossible to keep from the jury. Under the peculiar constitution of the federal courts, no appeal or writ of error is allowed in a criminal case, and McKee had no opportunity to take the judgment of an appellate court upon this question. It can scarcely be doubted what the judgment of an appellate tribunal upon the question as there presented would have been."

In case of *Palmer v. Utah & Nor. Ry. Co.*, 2 Ida. 315, 13 Pac. 425, the court, quoting from the case of *Knight v. Inhabitants of Freeport*, 13 Mass. 217, says: "We cannot be too strict in guarding trials by jury from improper influence. This strictness is necessary to give due confidence to parties in the results of their causes, and everyone ought to know that for any, even the least, intermeddling with jurors a verdict will always be set aside."

Upon the showing made by appellant that the jury was permitted to read said newspapers, in the absence of a showing upon the part of respondent that the articles complained of had been cut therefrom, or that none of the members of the jury read said articles, the court should have arrested the judgment and granted a new trial.

In the bill of exceptions presented in this case there is brought to our attention the ruling of the court upon a question propounded to the witness Albert Davis on his cross-examination, which we will briefly discuss in view of the fact that this case must be remanded for a new trial.

It had been shown by a witness produced prior to the examination of the said Davis that the Indians who composed the party returning from Pullman to Joseph had in their possession and had drunk a quantity of intoxicating liquor, and the witness Davis, a member of the party, having testified upon cross-examination, "I came down with the ball team from Pullman, Washington, to Joseph," the following question was propounded to him:

"Q. Had you been drinking that evening?

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“Objected to as incompetent, irrelevant, and immaterial, and not cross-examination; nothing asked about being to Pullman.

“Mr. McNamee: To show his mental condition.

“The Court: He is not here on trial or I would let you on your side of the case show it, just how much he did drink; but I hardly think it is cross-examination of this witness.”

This ruling was erroneous. It is said in 40 Cyc. 2574, as follows:

“The fact that a witness was intoxicated at the time of the events concerning which he testifies bears upon his capacity for accurate observation and correct memory, and hence is proper to be shown and considered in passing upon his credibility, although it does not render him absolutely unworthy of credit, and it is proper to cross-examine a witness fully as to whether he was intoxicated at such time, although the intoxication of the witness at such time may be shown without first asking him whether he was intoxicated.”

This seems to be a correct statement of the law. It is certainly proper to cross-examine a witness to an encounter, as to any facts showing his ability or lack of ability to properly observe, clearly understand, remember and relate what took place. The witness should have been required to answer the question.

The judgment is reversed and the cause remanded for a new trial.

Sullivan, C. J., and Budge, J., concur.

Points Decided.

(April 28, 1915.)

S. P. DOMER, Appellant, v. WESLEY C. STONE. EMMA F. STONE and SAMUEL R. STERN, Respondents.

[149 Pac. 505.]

APPEARANCE—HOW MADE—NOTICE—DEFAULT—HOW VACATED.

1. Sec. 4892, Rev. Codes, provides that "a defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of his appearance, or when an attorney gives written notice of appearance for him. . . ."

2. The written notice of appearance contemplated by said section is a statement in writing by the defendant or his attorney whereby the plaintiff is informed that the defendant has appeared, generally or specially, in the case and has submitted himself to the jurisdiction of the court.

3. A motion that a nonresident plaintiff be required to give security for costs is not an appearance as contemplated by said section.

4. In a case where such a motion has been made and such security has been given, if the defendant fails to appear, as provided in said sec. 4892 within the time specified in the summons, his default may be properly entered.

5. A nonresident plaintiff upon whom demand for security for costs has been made is not required to give notice to the defendant when such security is given, neither is the defendant, who has failed to appear, entitled to other or additional notice than that contained in the summons that the plaintiff will apply for a default against him.

6. When a default has been regularly and properly entered it can be vacated only upon a satisfactory showing being made that the defendant has a meritorious defense to the action and that he has failed to answer, or otherwise appear, by reason of mistake, inadvertence, surprise or excusable neglect.

7. In order to vacate a default it is incumbent upon the defendant to show that his mistake was one of fact and not of law, and the neglect of a lawyer to familiarize himself with the law governing the practice of the forum wherein his case is pending cannot be held to be excusable.

APPEAL from the District Court of the Second Judicial District for the County of Idaho. Hon. Edgar C. Steele, Judge.

Argument for Appellant.

Order vacating default and setting aside judgment.
Reversed.

H. Taylor and A. S. Hardy, for Appellant.

No appearance will stop the running of the time or the entry of a default except an answer; of course this answer may be an answer upon the merits or it may be a demurrer, which is an answer at law. But an answer in one of these ways must be made within the time provided. (*Morbeck v. Bradford-Kennedy Co.*, 19 Ida. 83, 113 Pac. 89; *Naderhoff v. Geo. Benz & Sons*, 25 N. D. 165, 141 N. W. 501, 47 L. R. A. N. S., 853; *Donlan v. Thompson Falls Copper & Milling Co.*, 42 Mont. 257, 112 Pac. 445.)

In all of the following cases a default was held to have been properly entered without notice of the application for same, pending a motion of some sort in the case, but without answer having been made as required by statutes similar to ours: *McDonald v. Swett*, 76 Cal. 257, 18 Pac. 324; *Ripley v. Astec Min. Co.*, 6 N. M. 415, 28 Pac. 773; *Pennie v. Visser*, 94 Cal. 323, 29 Pac. 711.

And in the following cases it has been held that a motion to quash the summons does not prevent the entry of a default: *Mantle v. Casey*, 31 Mont. 408, 78 Pac. 591; *Garvie v. Greene*, 9 S. D. 608, 70 N. W. 847; *Shinn v. Cummins*, 65 Cal. 97, 3 Pac. 133; *Risher v. Morgan*, 56 Ind. 172; *Higley v. Pollock*, 21 Nev. 198, 27 Pac. 895, 899.

No notice of the application for a default is ever required. (*Hall v. Whittier*, 20 Ida. 120, 116 Pac. 1031.)

"Courts will not readily afford relief from one's own fault or error of judgment." (*Council Imp. Co. v. Draper*, 16 Ida. 541, 102 Pac. 7; *Vollmer Clearwater Co. v. Grunewald*, 21 Ida. 777, 124 Pac. 278; *Holzeman v. Henneberry*, 11 Ida. 428, 83 Pac. 497; *Pearce v. Butte Elec. Ry. Co.*, 40 Mont. 321, 106 Pac. 563; *Redding Gold etc. Min. Co. v. National Surety Co.*, 18 Cal. App. 488, 123 Pac. 544; *Peterson v. Crozier*, 29 Utah, 235, 81 Pac. 860; *Shearman v. Jorgensen*, 106 Cal. 483, 39 Pac. 863; *Myers v. Landrum*, 4 Wash. 762, 31 Pac. 33; *Harr v. Knight*, 18 Ida. 53, 108 Pac. 539.)

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Reed & Boughton, S. R. Stern and W. N. Scales, for Respondents.

The power of the court should be freely and liberally exercised under the statute to mold and direct these proceedings so as to dispose of cases upon their substantial merits. (*Holzeman v. Henneberry*, 11 Ida. 428, 83 Pac. 497; *Hamilton v. Hamilton*, 21 Ida. 672, 123 Pac. 630; *Humphreys v. Idaho G. M. Co.*, 21 Ida. 126, 120 Pac. 823, 40 L. R. A., N. S., 817; *Jergins v. Schenck*, 162 Cal. 747, 124 Pac. 426; *O'Brien v. Leach*, 139 Cal. 220, 96 Am. St. 105, 72 Pac. 1004.)

MORGAN, J.—On February 25, 1914, the appellant filed in the district court of the second judicial district in and for Idaho county his complaint against the respondents in a suit to quiet title to 160 acres of land situated in said county. Summons was thereupon duly issued and, upon proper showing, it was ordered that personal service of the summons be made upon the respondents outside the state of Idaho in lieu of publication thereof. It appears from the record that personal service of said summons was made upon the respondents in the city of Spokane, Washington, on the 30th day of March, 1914. On April 22, 1914, the respondents filed a motion, supported by an affidavit, that the appellant be required to give security for costs upon the ground that he was a nonresident of the state of Idaho, and upon May 5, 1914, a cost bond in the sum of \$300 was filed in said cause by the appellant. On May 19, 1914, neither of said respondents having answered, demurred or appeared otherwise than as above stated, their default was entered by the clerk of the court, and thereafter and on the 25th day of May, 1914, the court having heard and considered appellant's proof, decree was entered as prayed for in the complaint. Thereafter and on June 3, 1914, the respondents moved the court to vacate, set aside and relieve them from the judgment and decree taken as above stated, said motion being based on the ground of mistake, inadvertence, surprise and excusable neglect on the part of said respondents and of each of them. Said motion was supported by the affidavit of Samuel R.

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Stern, one of the respondents, was accompanied by an answer to said complaint and was based upon the facts disclosed by said affidavit and answer and upon the records and files of the action. The motion was opposed by the appellant, and two affidavits by H. Taylor, Esq., of counsel for the appellant, were filed in opposition thereto. Upon the showing so made and upon the hearing of argument the trial judge, on September 30, 1914, made an order that the said motion be granted, that the respondents and each of them be relieved from said judgment and decree, that the said default be vacated and the judgment be set aside and that said action be tried upon its merits. From which order, so made and entered, this appeal is prosecuted.

Under the practice prevailing in Idaho an application to vacate a default may be based upon one of two grounds, or upon both:

1. That the default has been improperly or prematurely entered;
2. That while the default has been regularly and properly entered, the defendant has failed to answer or otherwise appear by reason of mistake, inadvertence, surprise or excusable neglect.

Both of these grounds are relied upon by respondents in this case. They insist that their motion to require appellant to give security for costs amounted to an appearance as defined by sec. 4892, Rev. Codes, which provides, in part, as follows:

“A defendant appears in an action when he answers, demurs or gives the plaintiff written notice of his appearance, or when an attorney gives written notice of appearance for him.”

Respondents contend that, having appeared, they were entitled to notice that appellant would move for a default. In this respondents are in error. The written notice of appearance contemplated by said section is a statement in writing by the defendant or his attorney whereby the plaintiff is informed that the defendant has appeared, generally or

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specially, in the case and has submitted himself to the jurisdiction of the court. The paper filed by the respondents in this case contained no such information. Its object was to require appellant to give security for costs and it neither possessed nor expressed any other purpose. Said section of the statute was before this court for construction in the case of *Washington County Land & Development Co. v. Weiser National Bank*, 26 Ida. 717, 146 Pac. 116, wherein it was held that a stipulation entered into between the parties and filed in the case with the clerk of the court did not constitute written notice to the plaintiff of the appearance of the defendant and was not an appearance as defined by said section.

The statutory time within which the respondents might answer, demur or make written appearance having expired, and they having failed to do so, their default was properly entered.

The affidavit in support of the motion to set aside the default was made by Samuel R. Stern, Esq., one of the respondents, who is an attorney at law engaged in the practice of his profession in Spokane, Washington, and in that vicinity. Mr. Stern states in his affidavit, among other matters, as follows: "That under the practice obtaining in the state of Washington it is customary to notify counsel who has appeared in the case when a cost bond thus demanded is filed; but that no notice was given to these defendants or their attorneys of the filing of a cost bond herein, for which reason these defendants failed to plead in the case." Said affiant further says: "That he was greatly taken by surprise upon learning such default had been taken, no notice of application having been given to him or his attorneys in the case."

There is no law in Idaho requiring that the adverse party be given notice that a bond for costs has been filed pursuant to motion, nor is there any law in this state requiring that notice, other than that contained in the summons, be given that a default will be applied for in case said adverse party has failed to appear as provided by law, and if it has ever

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been the practice or custom to give such notice in any part of the state, we have never heard of it.

The respondent should have filed a demurrer or answer at the time they moved that appellant be required to give security for costs. By so doing they would have prevented the default being taken against them and would not have been held to have waived their right to such security. (*Kissler v. Budge*, 24 Ida. 246, 133 Pac. 125.)

The only reason disclosed by the affidavit for failure to answer before the default was taken is based upon the practice or custom above referred to, prevailing in the state of Washington, pursuant to which, no doubt, the respondent, Stern, relied upon the appellant, who is also an attorney at law engaged in the practice of his profession in Spokane, to notify him when the bond to secure the payment of costs was filed. It appears that the management of the case was in the hands of appellant's attorneys, who reside in Idaho, and it does not appear that anything was said or done to mislead either the respondents or their counsel, or to prevent them from appearing and answering as they were warned by the summons they must do.

The rule is well settled in Idaho that where a trial court, in the exercise of its sound judicial discretion, upon a proper showing that a defendant, who has a meritorious defense, has failed to appear and answer by reason of his mistake, inadvertence, surprise or excusable neglect, sets aside the default which has been entered against him, its action in so doing will not be reversed upon appeal. In order to bring himself within this rule, however, the defendant must show that his mistake was one of fact and not of law. The neglect of a lawyer to familiarize himself with the law governing the practice of the forum where his case is pending cannot be held to be excusable. When a defendant, having received the warning given him by the plain terms of a summons, chooses to disregard it and to ignore the laws of the state governing the court from which it was issued, and when he elects to rely upon the purely imaginary security of the rules of practice of, or customs prevailing in, another state, if a default judg-

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ment is taken against him the courts are not invested with discretionary power to grant him relief from it. (*Holzeman v. Henneberry*, 11 Ida. 428, 83 Pac. 497; *Harr v. Kight*, 18 Ida. 53, 108 Pac. 539; *Morbeck v. Bradford-Kennedy Co.*, 19 Ida. 83, 113 Pac. 89; *Hall v. Whittier*, 20 Ida. 120, 116 Pac. 1031; *Vollmer Clearwater Co. v. Grunewald*, 21 Ida. 777, 124 Pac. 278; *State ex rel. Mills v. American Surety Co. of N. Y.*, 26 Ida. 652, 145 Pac. 1097.)

The default was properly entered, and it does not appear from the showing made that the respondents' failure to appear and answer was due to their mistake of fact, inadvertence, surprise or excusable neglect, and the motion to vacate the default and set aside the judgment should have been denied.

The said order is reversed and costs are awarded to appellant.

Sullivan, C. J., and Budge, J., concur.

Petition for rehearing denied.

Points Decided.

(April 29, 1915.)

LOUISE E. BARTON, Plaintiff, v. MOSES ALEXANDER, Governor, JOSEPH H. PETERSON, Attorney General, and GEORGE R. BARKER, Secretary of State, as the Board of Trustees of the Soldiers' Home, and ROBERT BARTON, Commandant of the Soldiers' Home, Defendants.

[148 Pac. 471.]

WRIT OF PROHIBITION—ANTI-NEPOTISM LAW—TITLE TO—CONSTITUTIONAL LAW—STATUTORY CONSTRUCTION—ASSOCIATES IN OFFICE—WHO ARE—POLICE POWER—REASONABLE REGULATION—DEGREES OF KINDRED—HOW COMPUTED—CIVIL LAW—RETROSPECTIVE ACT—ALLOWANCE OF CLAIMS—MUNICIPAL SUBDIVISIONS.

1. *Held*, that the title to the anti-nepotism bill or act is sufficiently broad to include and cover all of the provisions of said act and is not repugnant to the provisions of sec. 16, art. 3, of the state constitution.

2. "Associates in office" are those who are united in action; who have a common purpose; who share the responsibility or authority and among whom is reasonable equality; those who are authorized by law to perform the duties jointly or as a body.

3. *Held*, that the commandant of the Soldiers' Home is not an "associate in office" of the board of trustees of the Soldiers' Home.

4. The phrase, "associates in office," as used in said act refers to officers who are required under the law to act together, each having substantially equal authority in matters coming before them as boards or councils under the law.

5. Said act prohibits the officers therein named, or boards or councils composed of such officers, from appointing anyone to office related to them or to any member of such board or council within the third degree by affinity or consanguinity.

6. Said act prohibits the officers therein mentioned from making appointments on agreement or promise with other officers.

7. If a person is illegally appointed under the provisions of said act, the officer of the state, district, county, city or other municipal subdivision of the state who pays out of any public funds under his control or draws or authorizes the drawing of any warrant or authority for the payment out of any public funds of the salary, wages, pay, or compensation of any such ineligible person, knowing him to be ineligible, is guilty of a misdemeanor and may be punished as provided in the first section of said act.

Argument for Plaintiff.

8. If a person is legally appointed and eligible to hold the office to which he is appointed, the proper board or officer is not prohibited by said act from passing upon and allowing the claim of such appointee for salary, or wages, although such appointee may be related to such officer or a member of the board which is required under the law to pass upon such claim.

9. Said act is a police regulation and its provisions are reasonable and enforceable and not unconstitutional.

10. Under the provisions of sec. 5705, Rev. Codes, the degrees of kindred are computed according to the rules of the civil law, which rules are applicable to the act in question.

11. *Held*, that it was not intended that the provisions of said act should operate retrospectively.

12. Where appointments of persons related to officers within the prohibited degree have been made prior to the going into effect of said act, such appointees cannot legally be paid out of the public funds any salary or wages for services rendered subsequent to the going into effect of said act, to wit, the 8th day of May, 1915.

13. Irrigation, drainage, improvement and school districts do not come within the provisions of said act, since they are not municipal subdivisions of the state and are not specially included in said act.

14. *Held*, that said board of trustees of the Soldiers' Home will not violate any of the provisions of said act by retaining the plaintiff as matron of said Home.

Original application for a writ of prohibition to the board of trustees of the Soldiers' Home. Alternative writ granted. Anti-nepotism law construed.

C. W. Gibson and J. P. Pope, for Plaintiff.

The act violates sec. 3, art. 6, of the constitution, in providing an additional qualification to hold a civil office, in that no person shall be appointed for the sole disqualification that he is related within the third degree by affinity or consanguinity to the appointing officer or his voting associates. (*Bradley v. Clark*, 133 Cal. 196, 65 Pac. 395; *Thomas v. Owens*, 4 Md. 189; *Stryker v. Churchill*, 39 Misc. Rep. 578, 80 N. Y. Supp. 588; *Black v. Trower*, 79 Va. 123.)

The appointments of county officers under sec. 6 of art. 18 of the constitution is a matter of discretion placed in the

Argument for Plaintiff.

officers and board of county commissioners. (*Campbell v. Board of Commissioners*, 5 Ida. 53, 46 Pac. 1022.)

The act should be held unconstitutional if this discretion is taken away from a single officer of this state. (*In re Kane v. Gaynor*, 144 App. Div. 196, 129 N. Y. Supp. 280; *Ackley v. Perrin*, 10 Ida. 531, 79 Pac. 192.)

Consideration of the power of the legislative department to exercise or limit the exercise of the power of the executive department has often been before courts. (*Elliott v. McCrea*, 23 Ida. 524, 130 Pac. 785; *Ingard v. Barker* (Ida.), 147 Pac. 293; *People v. Freeman*, 80 Cal. 233, 13 Am. St. 122, 22 Pac. 173.)

The title to the act under consideration does not mention or refer to the provision in the body of the act which makes it unlawful for any executive, legislative, judicial, ministerial or other officer of the state, county, municipality, etc., to appoint or vote for the appointment of any person related to any of his associates in office within the third degree. (Sutherland, Stat. Const., sec. 111; Cooley's Const. Lim., 6th ed., p. 178; *Pioneer Irr. Dist. v. Bradley*, 8 Ida. 310, 101 Am. St. 201, 68 Pac. 295; *Turner v. Coffin*, 9 Ida. 338, 74 Pac. 962; *Katz v. Herrick*, 12 Ida. 1, 86 Pac. 873; *State v. Mulkey*, 6 Ida. 617, 59 Pac. 17; *Gerding v. Board of Co. Commrs.*, 13 Ida. 444, 90 Pac. 357.)

Statutes not expressly made retrospective in their terms are otherwise construed, if possible. (*People v. Hays*, 4 Cal. 127; *Bond v. Munro*, 28 Ga. 597; *Porter v. Glenn*, 87 Ill. App. 106; *In re Kennett*, 24 N. H. 139; *Sayre v. Wisner*, 8 Wend. (N. Y.) 661; *Dash v. Van Kleeck*, 7 Johns. (N. Y.) 477, 5 Am. Dec. 291; *Lindsay v. United States Savings etc. Co.*, 120 Ala. 156, 24 So. 171, 42 L. R. A. 783.)

If the body of the act were retrospective in terms, which it is not, the title is insufficient because it does not indicate that fact. (*Lindsay v. United States Sav. etc. Co.*, *supra*; *Snell v. Chicago*, 133 Ill. 413, 24 N. E. 532, 8 L. R. A. 858; *Lockport v. Gaylord*, 61 Ill. 276; *Briswick v. Mayor of Brunswick*, 51 Ga. 639, 21 Am. Rep. 240.)

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“Associates are persons united, or acting together by mutual consent or compact in the promotion of some common object.” (Anderson’s Law Dictionary; *Lechmere Bank v. Boynton*, 11 Cush. (Mass.) 369.)

J. H. Peterson, Atty. Genl., T. C. Coffin, E. G. Davis, and Herbert Wing, Assts., for Defendants.

When the bill was amended in the Senate in committee of the whole by the insertion of the phrase “associates in office,” no change in this regard was made in the title. We concede that the title is not sufficiently broad to cover such a phrase, and refer the court to the case of *State v. Dolan*, 13 Ida. 693, 700, 92 Pac. 995, 14 L. R. A., N. S., 1259, wherein this question received consideration.

This nepotism act, if it be sustained at all, must be sustained as an exercise of the police power of the state. It is a well-established principle that police regulations must be reasonable in order to be lawful. (Freund on Police Power, sec. 33; *State v. Dolan*, *supra*.)

The specific mention of road districts as being included within the terms of the law, and the fact that road districts are analogous to improvement districts, irrigation districts, drainage districts and school districts, might seem to evidence the intention of the legislature to exclude from the category all but road districts. This view is strengthened, so far as it respects school districts, by reason of the provisions of subdivision L of sec. 58 of the school code (1913 Sess. Laws, p. 44), and the ruling of this court in the case of *Fenton v. Board of County Commrs.*, 20 Ida. 392, 398, 119 Pac. 41, wherein the court held that under the provisions of sec. 6, art. 7, of the constitution, a school district was not a municipal corporation.

SULLIVAN, C. J.—This is an original application in this court for a writ of prohibition to the board of trustees of the Soldiers’ Home and to Colonel Robert Barton, commandant of said home, requiring them to show cause why they and each of them should not permit the petitioner to continue

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in the discharge of her duties as matron of said Soldiers' Home on and after May 8, 1915.

It appears from the petition that the petitioner, or plaintiff, is now and ever since the 15th day of September, 1913, has been, the duly appointed, qualified and acting matron of the Soldiers' Home; that the board of trustees of said home is composed of the Governor, the Secretary of State and the Attorney General, and that the defendant Robert Barton is, and ever since the first day of June, 1913, has been, the duly appointed, qualified and acting commandant of said Soldiers' Home, and is the father of the plaintiff; that said board of trustees has control and supervision of said Soldiers' Home, including the appointment and removal from office of the plaintiff; that on February 18, 1915, the Governor approved what is commonly known as the "Anti-Nepotism Bill," which bill makes certain appointments of relatives to positions unlawful and subjects the officer making such appointments to fine and removal from office; that on the 6th day of April, 1915, the plaintiff received a communication from said board of trustees notifying her that on and after the 8th day of May, 1915, the date when said anti-nepotism act becomes effective, her services would no longer be needed, for the following reasons and none other: 1st, that Col. Barton, commandant of the said Soldiers' Home, who, in the opinion of the board of trustees, is an associate in office of the members of said board, within the meaning of said act, is her father and therefore her appointment and continuance in office is unlawful under said act; 2d, that the furnishing of employment by the said board of trustees and the said Colonel Barton is a violation of the provisions of said act; that said act is a police measure and if the same attempts to provide against the appointment to office or employment of relatives by affinity or consanguinity within the third degree, to any clerkship, office, position, employment or duty, when the salary, wages, pay or compensation of such appointee is to be paid out of the public funds or fees of office by the associate of any officer so related, it is unconstitutional and void as being unreasonable;

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that said act, if it attempts to render unlawful the furnishing of employment to persons legally appointed prior to its enactment and approval under penalty of removal from office of the officer appointing such ineligible person, is unconstitutional and void as denying to the plaintiff and all others similarly situated, due process of law and equal protection of the laws under the constitution of the state of Idaho, and under sec. 14 of the amendments to the constitution of the United States; 3d, that if said act attempts to prohibit appointments as above set forth, the same is unconstitutional and void on the ground that the title fails to specify either of said grounds and is in violation of sec. 16, art. 3, of the constitution of the state of Idaho.

It is then alleged that the plaintiff is without any plain, speedy and adequate remedy in the ordinary course of law, and that she is beneficially interested in retaining her position as matron.

An alternative writ of prohibition was issued as prayed for, and on the return day the defendants demurred to the petition on the ground that the same did not state facts sufficient to entitle petitioner to the relief prayed for.

On the argument of the demurrer, counsel for the respective parties conceded that there were only questions of law involved in the case. The principal question is the constitutionality of the act known as the "Anti-Nepotism Bill," approved February 18, 1915, and in case said act is held constitutional, a construction of the several provisions of said act is sought to be obtained.

Said act is as follows:

"An Act making it an offense for any executive, legislative, judicial, ministerial, or other officer of this state, or any district, county, city or other municipal subdivision of the state, to appoint or vote for the appointment of any person related to him by affinity or consanguinity within the third degree, to any clerkship, office, position, employment or duty in any department or office of this state, or of any district, county, city, or other municipal subdivision of the state of which the

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person making or participating in the appointment may be an officer or employee, or to appoint any person so related to any other such officer in consideration of the agreement or promise of such other officer to appoint any person so related to the officer making such appointment; prohibiting the payment of any such ineligible person out of any public funds and providing for suitable punishment and removal from office for the violation of this act.

“Be It Enacted by the Legislature of the State of Idaho:

“Section 1. That an executive, legislative, judicial, ministerial, or other officer of the State or of any district, county, city or other municipal subdivision of the State, including road districts, who appoints or votes for the appointment of any person related to him or to any of his associates in office by affinity or consanguinity within the third degree, to any clerkship, office, position, employment, or duty, when the salary, wages, pay, or compensation of such appointee is to be paid out of public funds or fees of office, or who appoints or furnishes employment to any person whose salary, wages, pay or compensation is to be paid out of public funds or fees of office, and who is related by either blood or marriage within the third degree to any other executive, legislative, ministerial, or other public officer, when such appointment is made on the agreement or promise of such other officer or any other public officer to appoint or furnish employment to any one so related to the officer making or voting for such appointment, is guilty of a misdemeanor involving official misconduct and upon conviction thereof shall be punished by fine of not less than Ten (\$10.00) Dollars or more than One Thousand (\$1,000.00) Dollars, and such officer making such appointment shall forfeit his office and be ineligible for appointment to such office for one year thereafter.

“Sec. 2. That an officer of this State or any district, county, city or other municipal subdivision of the State who pays out of any public funds under his control or who draws or authorizes the drawing of any warrant or authority for the payment out of any public fund of the salary, wages,

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pay, or compensation of any such ineligible person, knowing him to be ineligible, is guilty of a misdemeanor and shall be punished as provided in Section 1 of this Act."

The first question presented by counsel for the plaintiff involves the constitutionality of said act, and it is contended that the title is not sufficiently broad to cover all of the provisions of said act and is therefore repugnant to sec. 16, art. 3, of the state constitution, wherein it is provided that "Every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title; but if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be embraced in the title." It is contended that the title does not mention or refer to the provision in the body of the act which makes it unlawful for the officers named in said act to appoint or vote for the appointment of any person related to any of his "associates in office" within the third degree. As to the main purpose or object of said constitutional provision, see Sutherland on Statutory Construction, sec. 111; Cooley's Const. Lim., 6th ed., p. 178; *Turner v. Coffin*, 9 Ida. 338, 74 Pac. 962; *Katz v. Herrick*, 12 Ida. 1, 86 Pac. 873.

The bill as originally introduced in the Senate contained identically the same title that it did after its amendment, passage and approval by the Governor, except that the last four words of the title, to wit, "and declaring an emergency," were stricken out. The first section of said act was amended by inserting therein the words, "or to any of his associates in office." Other minor amendments were made that are not involved in the questions here presented.

The title to said act is nearly as long as the act itself, and is almost an index of the act. In fact, it contains much more than is required by said constitutional provision as a title to such an act. The following would have been a sufficient title to said act: "An act prohibiting the appointment to public office of any person related to the officer making the appointment, by affinity or consanguinity within the third degree; prohibiting the exchange of such appointments by

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public officers, and prescribing penalties for the violation thereof." Such a title would fully express the object and purpose of the act. However, we think the title amply sufficient and not repugnant to the provisions of said section of the constitution. It is broad enough to include that provision of the act which prohibits the appointment of any person related to the officer named or to any of his "associates in office," by affinity or consanguinity within the third degree. We therefore hold that said title is sufficiently broad to cover all of the provisions of said act.

In this case it is conceded that the only reason why said board of trustees has notified the plaintiff that on and after May 8, 1915, the date when said bill becomes effective, her services will no longer be needed, is because she is the daughter of Commandant Barton, who, in the opinion of the board, is "an associate in office" of the members of the board, within the meaning of said act.

An "associate in office" is one who shares the office or position of authority or responsibility, and not an appointee who does not share the responsibility or authority of the office. "Associates in office" are those who are united in action; who have a common purpose; who share responsibility or authority and among whom is reasonable equality; those who are authorized by law to perform duties jointly or as a body. Under the provisions of the law the commandant is an appointee of said board and has entire control and management of the Soldiers' Home under such rules and regulations as may be prescribed by said board, and has no authority or equality with the members of the board in making such rules or regulations or in his own appointment or in the appointment of any other appointee that said board has authority to make. Clearly, he is not an "associate in office" as said phrase is used in said act. There is, therefore, no good reason, so far as the record shows, why the plaintiff should not be retained in her present position as matron of the Soldiers' Home, and if the board desires to retain her, it may do so and will not violate any of the provisions of said act.

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The phrase "associates in office," as used in said act, refers to officers who are required under the law to act together, for instance, as a board or city council, each having substantially equal authority in matters coming before them as a board or council under the law, and said act was intended to and does prohibit such officers or boards or councils from appointing anyone to office related within the prohibited degree to either or any of such officers who are members of such board or council. But such officers who have independent duties to perform, aside from those coming before them as members of a board or council, are not "associates in office" in the performance of those independent duties. For instance, the Governor has many duties to perform under the law that he must perform independently of any board of which he may be a member or of any associate in office. So with the Secretary of State, the Attorney General and other state, county and municipal officers. Those officers are not "associates in office" of anyone in performing those independent duties where they act independently of any other person or officer.

Said act absolutely prohibits officers who are not "associates in office" from making appointments on "agreement or promise" with other officers. The law thus makes it a penal offense for an officer to appoint one related to another officer within the prohibited degree upon an agreement or promise; and if such person is illegally appointed, the officer of the state, district, county, city or other municipal division who pays out of the public funds under his control, or who draws or authorizes the drawing of any warrant or authority for payment out of the public funds, the salary, pay or compensation of such ineligible person, knowing him to be ineligible, is also guilty of a misdemeanor and may be punished as provided in the first section of said act.

The legislature has thus provided a double check on the appointment by officers of relatives within the prohibited degree. First, it is made a penal offense to appoint such a person, and, second, it is made a penal offense for another officer to pay the salary or compensation of such appointee,

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knowing him to be ineligible or illegally appointed. For instance, the law prohibits the trustees or city council of any village or city from employing anyone related within the prohibited degree to any member of such board of trustees or council; or county commissioners from appointing anyone to any position who is related to either of the county commissioners within the prohibited degree. And again: If the sheriff agrees with the assessor, or has an understanding with him that if he will appoint a relative of his (the sheriff) in his office, he will appoint a relative of the assessor under him, such an agreement or understanding is prohibited by said act, and if such things are done, the one who disburses the compensation or salaries to such appointees is made criminally liable if he, knowing of such arrangement, pays such salary or compensation.

However, it was not intended to penalize an officer who pays out of the public funds or who draws or authorizes the drawing of warrants on the public funds or who allows claims for the salary, wages, pay or compensation of other appointees who have been legally appointed, although the officer allowing such claims or drawing the warrant or paying out the funds may be related to such appointee within the prohibited degree. For example: The Governor could appoint as his private secretary a person related within the third degree to the Secretary of State, if there were no agreement or promise such as is mentioned in the first section of said act between the Governor and the Secretary of State, as the Governor has the exclusive right to make such an appointment without the concurrence or assistance of any other officer; and the Secretary of State and the Governor, as members of the board of examiners, are not prohibited by said act from passing upon and allowing the claim of such appointee for salary or wages.

It is next contended that since said act is a police regulation, its provisions are unreasonable and unenforceable, and unconstitutional for that reason, and that it contravenes the provisions of the constitution of the state in that it is an infringement by the legislative department of the distinct

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functions of the executive and judicial departments of government and attempts to bind succeeding legislatures in the appointment of its officers; that it limits and tends to destroy the official functions of constitutional officers; that it limits the constitutional rights of officers to appoint qualified persons to, and violates the right of said persons to hold, appointive office; that it forfeits public office and makes persons ineligible for reappointment on the ground of misdemeanor, and that for those reasons it is against public policy and unconstitutional.

We are unable to concur in those contentions, since we believe it to be within the legislative power to prohibit officers from appointing persons to office related to them by affinity or consanguinity, in the interest of efficiency in public service and for the best interests of the people and of the municipal subdivisions of the state, and as a legitimate police regulation, in regard to which the law-making power may legislate, and reasonable legislation in regard thereto is constitutional and enforceable.

Nepotism is recognized as an evil that ought to be eradicated and stamped out, and we know of nothing in the state constitution that prohibits the legislature from passing reasonable regulations in regard thereto.

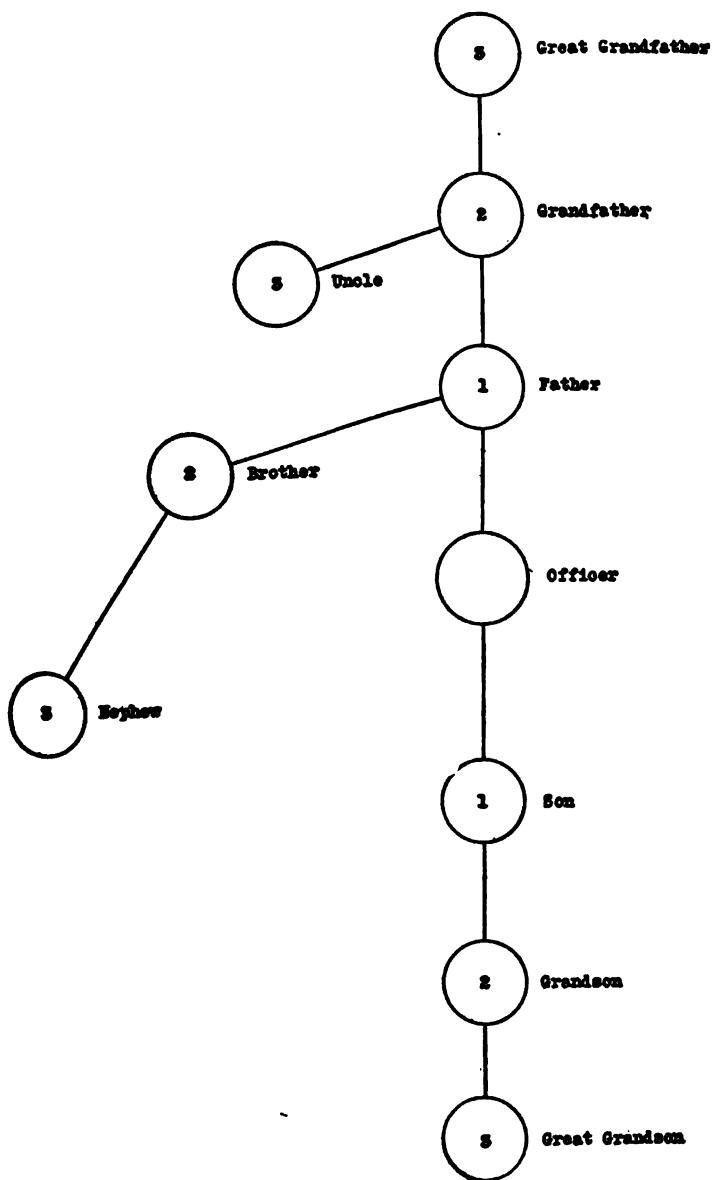
Since said act prohibits officers from appointing or voting for the appointment of any person related to them by affinity or consanguinity within the third degree, the question is presented as to under what law the degrees of relationship must be computed; that is, whether under the canon or common law, or under the Roman or civil law.

Under the provisions of sec. 5705, Rev. Codes, the degrees of kindred are computed according to the rules of the civil law and not the common law. That is the rule established in this state. It is evident that the legislative intent was to have the degrees of kindred under the act in question computed under the civil law. In computing degrees of affinity and consanguinity the civil law is generally followed in all the states of the Union. (4 Kent's Commentaries, 14th ed., bottom p. 473.)

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If the degrees of relationship were to be computed under the rules of the canon or common law, it would place the officer who is required to appoint a deputy or other officer in a very embarrassing and dangerous position, since under the rules of the common law the third degree of relationship exists between the public officer and all children, grandchildren and great-grandchildren of the great-grandfathers and great-grandmothers of such public officer. It might require experts in geneology to trace the degree of relationship between an officer appointing and the appointee in order to protect the officer from the penal provisions of the act in question. Under the civil law, it is an easy matter to determine who come within the third degree of relationship by affinity or consanguinity. Under the act in question an officer cannot appoint the following relatives of either himself or his wife: Parents, grandparents and great-grandparents; uncles and aunts; brothers and sisters; children, grandchildren, great-grandchildren; nephews and nieces. The following diagram may make the matter a little clearer:

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It will be observed from the above that cousins do not come within the prohibited third degree.

We hold that under said act, in determining the degrees of relationship, the civil law must be followed.

The next question presented is whether said act affects appointments made prior to its becoming operative or prior to its going into effect, and was it intended that the act should operate retrospectively?

The first section of said act provides that any of the officers therein named "who appoints or votes for the appointment of any person related to him," etc., is "guilty of a misdemeanor involving official misconduct, and upon conviction thereof shall be punished by fine . . . and shall forfeit his office and be ineligible for appointment to such office for one year thereafter." The legislature by using that language evidently did not intend to make an official guilty for acts done prior to the date of said act that were not crimes at the time said acts were done, and the language. "who appoints or votes for the appointment of a person related to him," clearly indicates that the legislature did not intend to make said act retrospective or *ex post facto*. If it did so intend, the law would be absolutely void for attempting to make an act a crime when it was not a crime at the time the act was performed. *Ex post facto* laws are prohibited by sec. 16, art. 1, of the constitution of this state and are also prohibited by the provisions of the constitution of the United States. Nor is there anything in the title of the act that would indicate that the legislature intended that the act should have a retroactive effect.

However, sec. 2 of said act provides that any officer therein named who "pays out of any public funds under his control or who draws or authorizes the drawing of any warrant or authority for the payment out of any public funds of the salary, wages, or compensation of any such ineligible person, knowing him to be ineligible, is guilty of a misdemeanor and shall be punished as provided in section 1 of this act." Taking into consideration the purview of said act, it is clear that the legislature did not intend that any ineligible ap-

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pointee should receive or draw any pay from the public funds after said act had gone into effect, even though he had been appointed prior to the going into effect of said act. The court having arrived at that conclusion, the appointees referred to cannot legally draw or be paid out of the public funds any salary or wages for services rendered subsequent to the going into effect of said act, to wit, the 8th day of May, 1915. Therefore all officers referred to in said act should see to it that their appointees are eligible under the provisions of said act from the date said act goes into effect.

Several questions are involved or arise in the practical application of this law, and owing to the numerous officials who are vitally interested in the construction to be placed upon this act, we will suggest a few of those questions and the conclusion of the court upon them.

First, is the head of one department of the state, county or city government liable if he appoints to office a person related within the prohibited degree to the head of another department? The head of one department is not liable under said law for the appointments made by the heads of other departments where he is not an "associate in office" and cannot, under the law, participate in such appointment.

The next question is: If an appointee of one department of the state, county or city government is related within the prohibited degree to a member of the state board of examiners or the board of county commissioners or the city council, can such boards approve a claim for such appointee's salary without rendering themselves liable under the provisions of the second section of said act?

Since the head of one department cannot control the appointments of another department, the board which is called upon to allow the claims of appointees is not liable under the provisions of said section for allowing claims of appointees who have been legally appointed, although such appointees may be related within the prohibited degree to a member of the board or person who allows or pays such claims.

The next question is: Is it permissible under the provisions of said act for certain members of a board, such as, for in-

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stance, the board of county commissioners, city council or trustees of a village, without the concurrence of the third member, to appoint to office a person related within the prohibited degree to such third member?

The clear intention of the law was to prohibit such appointments, for if by collusion or agreement two members of a board were to appoint to office a person related to the third member within the prohibited degree, it would be a very easy matter to evade the provisions of said law where appointments were to be made by boards. Such appointments are prohibited. This applies equally to all state boards and all other boards of municipal subdivisions of the state, since the members of said boards, when acting as boards are "associates in office."

The next question is: Are school districts, irrigation, drainage and improvement districts included within the provisions of said law?

It will be observed from the title that it applies to municipal subdivisions of the state and the first section of said act is in part as follows: "That executive, legislative, judicial, ministerial or other officer of this state or of any district, county, city, or other municipal subdivision of the state, including road districts," etc. The title as well as the body of the act clearly indicates that it was intended to apply to municipal subdivisions of the state and also to road districts. The act having especially enumerated only one subdivision, to wit, a road district, that is not a municipal subdivision, all other subdivisions of the state which are not municipal subdivisions are excluded, hence it does not apply to school districts, irrigation districts, drainage districts or improvement districts, since they are not municipal subdivisions of the state. This court held in *Fenton v. Board of Commrs.*, 20 Ida. 392, 119 Pac. 41, that a school district is not a municipal corporation within the meaning of sec. 6, art. 7, of the constitution. Said act is only intended to apply to municipal subdivisions of the state and road districts.

This proceeding was brought for the purpose of obtaining from this court the proper construction to be placed upon

Points Decided.

the several provisions of said anti-nepotism act. No question has been raised in regard to the power and authority of the board to discharge the petitioner without giving any reason for such discharge, but it is conceded that the board does not desire to discharge her at the present time, at least, unless under the provisions of said act they would be guilty of a misdemeanor and become liable under the penal provisions of said act if they retained her after said act goes into effect.

As we view it, it will not be necessary for this court to direct the peremptory writ of prohibition to issue, since we hold that the defendants, as a board of trustees of the Soldiers' Home, may retain the plaintiff as matron of the Soldiers' Home, if they desire to do so, and by so doing they will not violate any of the provisions of said anti-nepotism act.

No costs are allowed in this case.

Budge and Morgan, JJ., concur.

(April 30, 1915.)

HARRY G. DARWIN, Respondent, v. EDYTHE JORDAN
DARWIN, Appellant.

[149 Pac. 467.]

DEFAULT—SETTING ASIDE—DISCRETION OF COURT.

1. *Held*, that the court did not abuse its discretion in refusing to set aside the default entered against the appellant.

APPEAL from the District Court of the Second Judicial District for the County of Nez Perce. Hon. Edgar C. Steele, Judge.

Motion to set aside default entered against the defendant. Motion denied. *Affirmed*.

Argument for Respondent.

Miles S. Johnson, for Appellant.

"Since a judgment by default is not favored in divorce suits, the courts are specially inclined to interpose by opening or setting aside such a judgment and giving defendant a day in court so that the merits of his defense may be passed on." (14 Cyc. 714; 7 Ency. Pl. & Pr. 141; *McBlain v. McBlain*, 77 Cal. 507, 20 Pac. 61; *Wadsworth v. Wadsworth*, 81 Cal. 182, 15 Am. St. 38, 22 Pac. 648; *Cohn v. Cohn*, 85 Cal. 108, 24 Pac. 659; *Mulkey v. Mulkey*, 100 Cal. 91, 34 Pac. 621; *Smith v. Smith*, 145 Cal. 615, 79 Pac. 276; *Hyser v. Hyser*, 53 Colo. 199, Ann. Cas. 1914B, 356, 124 Pac. 346; *Pringle v. Pringle*, 55 Wash. 93, 104 Pac. 135; *Young v. Young*, 17 Minn. 181.)

"The discretionary power of the trial judge, upon an application to open a default, means a sound and impartial discretion, and should be resolved, in case of doubt, in favor of the application." (*Hamilton v. Hamilton*, 21 Ida. 672, 123 Pac. 630; *Parsons v. Wrble*, 19 Ida. 619, 115 Pac. 8.)

Henry S. Gray, for Respondent.

"The courts will generally hear motions to vacate divorce judgments on the same grounds and conditions as any other judgments, except, perhaps, that they proceed with greater caution and with more anxious care for the intervening rights of strangers." (Black on Judgments, 2d ed., sec. 320; 2 Bishop, Marriage & Divorce, sec. 750; *Parish v. Parish*, 9 Ohio St. 534, 75 Am. Dec. 482.)

This court has taken the same attitude with respect to such applications in divorce actions as it has in other actions, and has refused to disturb the action of the trial court. (*Hamilton v. Hamilton*, 21 Ida. 672, 123 Pac. 630; *Richards v. Richards*, 24 Ida. 87, 132 Pac. 576.)

Where applications involve questions of law alone, no discretion on the part of the trial court is involved, but where the application presents a question of fact only, the application is then directed to the discretion of the court. (*Humphries v. Idaho Gold Mines etc. Co.*, 21 Ida. 126, 120 Pac. 823, 40 L. R. A., N. S., 817.)

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SULLIVAN, C. J.—This is an appeal from an order denying defendant's motion to open, vacate and set aside a default and decree entered against her in an action for divorce, and permit her to appear and answer to the merits. The ground of said action was cruel and inhuman treatment. The denial of said motion by the court is the only error assigned.

The record shows that the complaint was filed August 3, 1914, at a time when the defendant was in the east on a visit, having left Lewiston, Idaho, the latter part of May, 1914. A summons was issued shortly after the complaint was filed and placed in the hands of the sheriff for service and was returned unserved on August 14, 1914. On August 16th this plaintiff filed an affidavit and obtained an order for service for an *alias* summons out of the state, to wit, in Boston, Mass. Said *alias* summons was issued and was thereafter returned unserved. On September 15, 1914, the plaintiff filed an affidavit for the publication of summons, making application thereunder to have the former order for service of *alias* summons set aside, and on said date obtained an order for the publication of the said summons in the "Lewiston Morning Tribune." The summons was published in said newspaper for the time prescribed by law, but proof of such publication and the mailing of the copy of the summons and complaint was not filed, for the reason stated in the affidavit of the attorney for the plaintiff, namely, that prior to the completion of such publication a copy of the *alias* summons and complaint was personally served on the defendant at Lewiston, Idaho, by the sheriff of Nez Perce county. On October 10, 1914, the defendant arrived in Lewiston accompanied by a Mrs. Baker, a mutual friend of the parties to said action. Appellant's arrival was without notification to her husband. The appellant and the mutual friend remained in Lewiston until the morning of the 14th of October, spending the day time at the Darwin home and the nights at the Bollinger Hotel, except the night of the 13th, which they were permitted to spend at the husband's ranch. It appears that during those three days the conversation was almost continuously on the subject of divorce pro-

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ceedings, appellant urging that the proceedings be dropped or postponed and respondent insisting that they be carried on to final determination in court.

On the afternoon of the 13th of October, the appellant was personally served with the summons and a copy of the complaint, and after receiving them they were placed on her husband's desk and thereafter he sent them to her by mail. The summons was also published in the "Lewiston Morning Tribune" for the time prescribed by law, and a copy of the summons and complaint was mailed to the appellant, directed to her brother's residence, No. 12 Fairland St., Roxbury, Mass. The record thus shows that she was served with summons personally and also by publication. It appears from the record that the service of summons was completed on November 2, 1914, and that default was entered on the 7th of November. The appellant failed to make any appearance whatever.

Thereafter on the 16th of November, the court having heard the evidence, made and entered finding of facts, conclusions of law, and entered a decree in favor of the respondent, awarding him the divorce prayed for, and also approving, by way of property settlement, a certain trust agreement wherein and whereby the plaintiff made provision for the defendant, to be operative in case of his death. The decree also included provision for the defendant's support and maintenance during the plaintiff's life.

On December 9, 1914, the appellant made a motion and filed certain affidavits whereby she sought to have vacated said default and decree, alleging in her affidavit that on the evening of October 13, 1914, the respondent induced her to return to Boston by promising if she would do so he would drop the proceedings for the divorce and would send for her the following spring. This statement made in the affidavit of the appellant was emphatically denied by the respondent and he states in his affidavit that he never heard of any such promise until he read it in the affidavit. Lengthy affidavits were filed by the appellant and the respondent on said motion. In fact, the affidavits filed cover many pages of

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the record, and the record also contains many letters written by the appellant to the respondent and letters written by the respondent to the appellant. The record contains over 100 pages of typewritten matter.

After hearing arguments on said motion, based on the affidavits and record, the trial court entered an order denying the appellant's motion and application, and the only question presented is whether the court erred in denying said motion.

From the whole record we are satisfied that the trial court did not err in holding that the respondent did not agree with the appellant that if she would return east he would drop proceedings for divorce and send for her the following spring, and that appellant was properly served with summons and knew of the pendency of said action and failed to appear and answer, and that no deception was practiced by respondent in said matter.

It will serve no good purpose to review the lengthy affidavits and letters presented in the record which were considered on the trial. We therefore shall not attempt to review them in this opinion, since it is clear to us that the trial court did not abuse its discretion in denying said motion.

Each party to pay his own costs on appeal.

Morgan, J., concurs.

BUDGE, J., Dissenting.—I am unable to agree with the majority of the court in the conclusions reached in this case. The facts as set out in the majority opinion, so far as they relate to the matter discussed, are correctly stated, but for the purpose of making my position clear and in support of my contention that a different rule of law should be applied in cases of this character, certain additional facts which appear in the record will be briefly referred to.

The complaint of the respondent was filed on August 3, 1914, in which it is alleged, among other things, that for more than four years last past appellant treated respondent in a cruel and inhuman manner, rendering his life burdensome and inflicting upon him grievous bodily injury and grievous

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mental suffering, anguish and pain; thereafter setting out certain specific acts of extreme cruelty, among which appellant is charged with over-indulgence in intoxicating liquors and while under the influence thereof, with indiscreet acts, the use of violent, abusive and scandalous language; that in the spring of 1910, appellant went to Spokane, and while there conducted herself in such a manner that the management of the hotel requested her removal; that at various times appellant threatened and sought the life of respondent; that appellant, in the summer of 1912, against the protest of respondent, went to Atlantic City, New Jersey, where she resided while respondent was in England on business; that she refused to write to him, and conducted herself, while in Atlantic City, in a reprehensible manner, frequenting cafés and places of low repute with divers persons, and remained in such places to unseemly and late hours, thereby subjecting herself to scandalous comment and injurious criticism; that in the spring of 1913, while at their home in Lewiston, appellant ridiculed and derided the people of Lewiston, and used profane and vulgar language on many occasions in the hearing of their minor child; that in the spring of 1912 appellant indulged herself excessively in intoxicating liquors, exhibiting herself upon the streets and in houses in Lewiston and Clarkston, Washington, in an intoxicated or semi-intoxicated condition; that she was dissipated, reckless and extravagant in her manner.

The appellant in her affidavit of merit, which was filed in support of her motion to set aside the default and vacate the decree, specifically denies each and every allegation of the respondent's complaint, and among other things states that upon the occasion of her visit to Spokane, during the spring of 1910, she was taken by her husband to Crystal Springs Sanitarium at Portland, Oregon, where she was treated for a serious nervous ailment for a period of three months, after which she was accompanied to her home by a trained nurse, who remained with her for more than a month.

Referring to the allegation in respondent's complaint that appellant visited Spokane against his wishes, and bearing

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upon her trip to Spokane, we find in the record the following telegrams:

“Spokane, Washington, March 13, 1910.

“Mr. Harry G. Darwin, No. 15 Williams St.,
“New York.

“Marie left me Wednesday March second. Became so afraid sleeping in house alone that I have not slept for four nights consequently stomach knocked out. Mrs. Buck took Gilbert and I will await your return here at Spokane Hotel. Wire when you will start. Not alone; have friends here.

“EDIE.”

“(Day Message) New York, Mch. 14, 1910.

“Mrs. H. G. Darwin,

“Hotel Spokane,
“Spokane, Wash.

“Will wire tomorrow when will leave. Remain at Spokane until I arrive. H. G. DARWIN,”

“(Night letter) New York, Mch. 14, 1910.

“Mrs. H. G. Darwin,

“Hotel Spokane,
“Spokane, Wash.

“Leave Thursday afternoon. Due Hotel Ryan, St. Paul Saturday morning. Write fully and wire me there. Due Spokane Monday morning. Will advise as to possible stop-over Spokane from St. Paul. Telephone Buck regularly as to Gilbert. Advertise for maid Spokane papers to return with us. Get all fun possible from visit but be reasonable and judicious. Who is with you.

“H. G. DARWIN.”

The appellant was charged by her husband with going to Atlantic City against his will and there conducting herself in an extremely reprehensible manner, where it is alleged she was extravagant, wasteful and indulged in intoxicating liquors to excess. We find as a part of appellant's affidavit of merit, and in contradiction to this charge, some twenty-two letters and telegrams which she received from her hus-

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band while in Atlantic City. The following excerpts will serve as samples:

“Waldorf Hotel, Aldwych, W. C.

“London, June 25, 1912.

“Dearest Ones,

“Your cable from Atlantic City came last evening but the stupid clerk did not give it to me until this morning. At the same time gave me one that arrived last Wednesday. . . . Hug my dear little man *hard* for me, and then he can turn around and do it to you, also for me. . . .”

“Hotel Longacre, New York,

“Aug. 14, 1912.

“Dearest:

“ Your yesterday letter indicates that you are tired of Atlantic City, but there is no other place I know of now, where you can live any cheaper, and as far as I can see, you had better stay on for a week or so at least.

“With lots of love,

“DADDA.”

It appears from the record that the appellant went east in May, 1914, on account of serious illness, in obedience to the wishes of her husband. As evidence of appellant's mental condition just prior to his visit east, we find in the record the following communication addressed to her brother, Joseph G. Curry, Roxbury, Mass., of date May 2, 1914, signed by respondent, in which he says, among other things:

“Your sister, and my wife, is again in such a very nervous condition that her friends and her physician insist that she must be restrained and confined, for her own safety and for that of those around her. I feel that if she is placed in the only place we have near here, the state asylum, she will not survive the shock, but that if she can be returned to the east, where she can see her family and friends, and be among more congenial surroundings, she will regain at least a degree of nervous health which may enable her to live on for many years yet, and perhaps, after her change of life is over, restore her to complete health.”

A little over two months after respondent had sent his wife east broken down in health, a mental wreck and a fit

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person, in his judgment, for the state asylum, he instituted divorce proceedings against her, in which he sought an absolute separation and the custody of their minor child. This fact, in connection with others recited in the record, and the conduct of the respondent in placing the appellant in a sanitarium for treatment for nervous disorder, establishes conclusively to my mind that the appellant was not in such a mental condition that she was capable of coping with her husband in his efforts to secure a separation and the sole custody of their minor child, of which facts I think the respondent was fully cognizant.

When she returned in October, 1914, it is clear to my mind, from a careful consideration of the entire record, that she had not recovered and was not capable of fully comprehending the nature of the divorce proceedings which had been instituted against her, and that she returned east with an understanding upon her part that the proceedings would be dismissed. We find in the affidavit of Annie E. Baker, filed in support of the affidavit of appellant, made on January 6, 1915, among other statements, the following: "I was present at the house of Harry G. Darwin in Lewiston, Idaho, at which time his wife, Edythe Jordan Darwin, was also present; that both Mrs. Darwin and myself remained overnight at said house; that during said evening I heard certain conversation between Mr. and Mrs. Darwin relative to divorce proceedings which he had commenced against her, and I heard him say to her that if she would return to Boston he would drop the case and that he would give her what money he was able to raise and would send for her in the Spring." It is true that this same Mrs. Baker made another affidavit on January 15, 1915, in which she says, among other things: "Upon mature deliberation, and after refreshing my memory as to the various occurrences and conversations that took place during the time I was at Lewiston, Idaho, . . . I desire and request that the portion of my said former affidavit, . . . be changed and modified in the following respects, . . . That I heard much conversation between Mr. and Mrs. Darwin during the said three days, . . . I know that Mrs.

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Darwin repeatedly urged Mr. Darwin to drop the proceedings, and that Mr. Darwin was equally insistent that they should be carried on, . . . that I find myself unable to repeat anything definite that either of the parties said, and I have so stated to Mr. Darwin in a letter written to him on December 10th, 1914; and I do not wish to be understood as saying, upon my oath, that I heard Mr. Darwin tell Mrs. Darwin that if she would return to Boston he would drop the case and that he would give her what money he was able to raise and would send for her in the spring; for I cannot swear that I heard Mr. Darwin say any such thing. I may have obtained that impression solely through my conversations with Mrs. Darwin during the several days we were traveling together on our return to the east."

Whatever doubt there may have been in the mind of the court with reference to the truthfulness of the Baker affidavit, should have been resolved in favor of the appellant.

There is abundant evidence in the record to show that appellant made every effort to bring about a reconciliation between herself and her husband, upon her return to Lewiston. There is also evidence in the record which shows that the respondent's conduct toward the appellant upon her return home was pleasant and affectionate, and not such as would indicate that he seriously intended to prosecute to a final determination the action he had instituted for a divorce.

It will be borne in mind that the default was entered November 7, 1914; that the decree of divorce was rendered on November 16, 1914; that the appellant was in the east when the default was entered and the decree granted; that she filed her motion to vacate and set aside the default and decree on December 9, 1914, during the same term of court that the default and decree were entered. Sufficient facts have been referred to, which would have justified the court in laying down what I consider the proper rule of law to be followed in cases of this character. In case of *Humphreys v. Ida. Gold Mines Develop. Co.*, 21 Ida. 135, 120 Pac. 823, 40 L. R. A., N. S., 817; this court said: "The showing of mistake and excusable neglect is very slight in this case and extremely

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meager on which to rest the order. On the other hand, however, under the rule so uniformly recognized, not only by this court, but by many other courts, that every reasonable doubt in such cases will be resolved in favor of a trial upon the merits, and that every fair presumption will be indulged in support of an order opening a default and allowing a trial upon the merits."

In an action for a divorce, where a default has been taken, a much more liberal rule should be followed than in an ordinary action involving property rights, for the reason that the state, as well as the parties to the action, are interested in the marital relationship.

"The state is interested in the marriage relation, since this relation is promotive of morality and inures to the perpetuation of its citizens." (9 Am. & Eng. Ency. Law, 728.)

"In every civilized country marriage is recognized as the most important relation in life, and one in which the state is vitally interested. The right of the legislative department to determine upon what conditions and in what manner the marriage relation may be entered into, and, having been entered into, for what causes and in what manner it may be dissolved, is unquestioned. The well-recognized public policy relating to marriage is to foster and protect it, to make it a permanent and public institution, to encourage the parties to live together, and to prevent separation and illicit unions." (See Nelson on Divorce and Separation, vol. 1.)

"This policy finds expression in probably every state in this country in legislative enactments designed to prevent the sundering of the marriage ties for slight and trivial causes, or by the agreement of the husband and wife, or in any case except upon full and satisfactory proof of such facts as has been by the legislature declared to be a cause for divorce. Such provisions find their justification only in this well-recognized interest of the state in the permanency of the marriage relation. While an action to obtain a decree dissolving the relation of husband and wife is nominally an action between two parties, the state, because of its interest in maintaining the same, unless good cause for its dissolution

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exists, is an interested party. It has been said by eminent writers upon the subject that such an action is really a triangular proceeding, in which the husband and the wife and the state are parties." (*Deyoe v. Superior Court*, 140 Cal. 476, 98 Am. St. 73, 74 Pac. 28.)

No divorce should be granted where the testimony offered in support of the allegations is not corroborated, and every reasonable opportunity should be afforded each of the parties to a full hearing upon the trial. The tendency of the courts of this country is now strongly in opposition to *ex parte* divorces, and the taking of default judgments in divorce cases should not be encouraged, and no technical rule of proceeding should be invoked in order to deprive either of the parties of an opportunity to present testimony in opposition to an application for a divorce; and this is more particularly true where minor children of the litigant and their custody are involved.

"Since a judgment by default is not favored in divorce suits, the courts are specially inclined to interpose by opening or setting aside such a judgment and giving defendant a day in court so that the merits of his defense may be passed upon." (14 Cyc. 714.)

"Where a default has been entered against a defendant, the court will readily set the same aside in order that defense may be interposed and the interests of the public protected by a trial upon the merits. Not only the parties but the public have an interest in the result of every suit for divorce, and the court should afford a hearing to protect the interests of the state." (7 Ency. Pl. & Pr. 141.)

"Not only can no divorce be granted upon the default of the defendant, or a finding of fact made by a referee, but the law inhibits the granting of divorces upon the uncorroborated testimony or admission of the parties. The parties to the action are not the only people interested in the result thereof. The public has an interest in the result of every suit for divorce; and the policy and the letter of the law concur in guarding against collusion and fraud; and it should be the

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aim of the court to afford the fullest possible hearing in such matters." (*McBlain v. McBlain*, 77 Cal. 507, 20 Pac. 61.)

"In the present case there seems to have been an honest desire on the part of the plaintiff to present her side of the case; and while, in an ordinary action, the neglect shown might be sufficient to deprive her of a right to relief, yet in this kind of a case a more liberal rule should prevail." (*Wadsworth v. Wadsworth*, 81 Cal. 182, 15 Am. St. 38, 22 Pac. 648.)

"In discussing this matter we have limited our consideration to the rule as applied to actions for divorce. It is a matter of public policy that divorces should only be granted where the fullest opportunity has been afforded both sides to be heard, and then only when adequate cause for divorce is shown. Whether such adequate cause exists can only be disclosed after both sides have had an opportunity to present all their evidence. The public has an interest in having no divorce granted excepting for good cause, and it is this consideration of public interest which has largely entered into the formulation by the courts of a more liberal rule to be applied in relieving from default in divorce cases than applies in other cases, where property rights alone are involved." (*Smith v. Smith*, 145 Cal. 615, 79 Pac. 276; *Cohn v. Cohn*, 85 Cal. 108, 24 Pac. 659; *Mulkey v. Mulkey*, 100 Cal. 91, 34 Pac. 621; *Hyser v. Hyser*, 53 Colo. 199, 124 Pac. 346; *Pringle v. Pringle*, 55 Wash. 93, 104 Pac. 135.)

"The proper regulation and control of the marriage relation is of so much importance to society, the well-being of the community is so far involved in the permanence of this relation, that the state, through its courts, exercises a peculiar guardianship over marriage and divorce. Society, as represented by the state, has an interest in maintaining the rules, which have been prescribed by the proper authority concerning marriage and divorce, which interest it is the duty of the courts to protect.

"A divorce is not granted simply because the parties are willing that it should be, nor because the defendant makes default, or neglects to assert, or waives a defense.

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“In proceedings of this kind, any course of action upon the part of a plaintiff, which is designed, and tends, and operates, to deprive or exclude a defendant from setting up and establishing a defense, which, if established, would prevent the granting of the divorce, is a fraud upon the administration of justice, as well as a fraud upon the defendant.” (*Young v. Young*, 17 Minn. 181.)

In the hearing in the case at bar, upon the motion to set aside the default, no evidence was taken and the same was heard solely upon the affidavits of the appellant and respondent and corroborating affidavits of Annie E. Baker, a mutual friend, and Harry S. Gray, attorney for respondent.

This court, in the case of *Parsons v. Wrble*, 19 Ida. 619, 115 Pac. 8, laid down the following rule, where a hearing is had upon affidavits:

“It appears from the record that all of the evidence presented to the district court was documentary, and it is argued by appellant, and we think rightfully, that while the vacation of the judgment, or granting of a new trial is a matter in the discretion of the trial court, and that unless there is a manifest abuse of that discretion the order will not be reversed on appeal, still this rule is to be governed by the rule that in such cases (hearing on documentary evidence alone) this court will make an original examination of the evidence as contained in the record and will exercise its judgment and discretion the same as if the case were being presented to us in the first instance.”

“The discretionary power of the trial judge upon an application to open a default means a sound and impartial discretion, and should be resolved, in case of doubt, in favor of the application.” (*Hamilton v. Hamilton*, 21 Ida. 672, 123 Pac. 630.)

Where an action to set aside a default and vacate a decree is supported by an affidavit of merits, the respondent should not be permitted, under the practice of this state, to rebut said affidavit of merits by counter-affidavits reciting the testimony offered in support of respondent's complaint.

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The respondent in this case, in his counter-affidavits, set out facts which, if true, would have been proper if presented upon the trial of the merits, but had no place in respondent's counter-affidavits and should not have been allowed or considered by the court. Courts will not try the merits of a case upon affidavits. (*Douglass v. Todd*, 96 Cal. 655, 31 Am. St. 247, 31 Pac. 623; 23 Cyc. 958.)

"A promise of plaintiff that he would not press the case to judgment, in violation of which plaintiff, without notice to defendant, enters a default, or secures a judgment against the latter in his absence, is good ground for vacating the judgment." (23 Cyc. 920.) This principle of law is certainly applicable to the case under consideration.

The refusal of the court to vacate the default and set aside the decree upon the application of the appellant placed upon each and all of said allegations contained in respondent's complaint the absolute stamp of truth and verity, and branded the wife and mother with being intemperate, of dissolute habits, uncouth and vulgar; a wife who had sought to take the life of her husband, the father of her child, an unfit person to care for and enjoy the custody and love of her offspring. She was not permitted to appear and file her answer and offer evidence to refute the serious allegations made against her, primarily by reason of the fact that her mental condition was not specifically assigned as a ground for vacating the default and setting aside the decree.

I think, in an action of this character, and under the authorities cited, the appellant should have had her day in court and been furnished, by order of the court, with sufficient funds to employ counsel and secure testimony for the purpose of establishing the facts set out in her affidavit of merit. I gather from the record that the appellant had no funds with which to employ counsel or marshal her witnesses. She had been deprived of the custody of her child. She was away from her friends and immediate relatives, with no one to counsel or advise her. She acted upon the suggestion of her husband, encouraged by their mutual friend, Annie E. Baker, and left the state with an action for divorce pending against her—

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under what I believe, based upon the record in this case, to have been a positive understanding on her part, as far as she was capable of forming an understanding, that the divorce proceedings would not be pressed and that when she regained her usual health that she would be sent for by her husband and again enjoy the love and society of her child and the care and protection of her husband.

In an ordinary case it is true, as laid down in the majority opinion of this court, that the appellant having been notified by summons of the pendency of the action, and the time for demurring and answering having expired, the default was properly entered, and that she had not, under the technical rules of law applied in ordinary cases, set out sufficient facts in her affidavit of merit to warrant the court in refusing to exercise its discretion. But when we consider the situation of the parties, the interest of the state in the marital relationship, the mental condition of the appellant, the influences that were brought to bear to induce her to leave the state, the fact that she had been charged with drunkenness and associating with lewd people, had attempted the life of her husband, and was an unfit and improper person to have the custody of her child, and that the application to vacate the default and set aside the decree was made during the same term of court and within a very short time after the decree was granted, it seems to me that there was a sufficient showing to have justified the trial court and to justify this court in vacating the default and setting aside the decree and permitting this woman to make a defense to these charges.

In my opinion, the judgment of the trial court should be reversed, the default vacated and set aside and the appellant given an opportunity to be heard, and furnished sufficient means with which to employ counsel, secure the attendance of her witnesses, and such other and further relief as might be necessary in order that justice be done in this proceeding.

Petition for rehearing denied.

Argument for Appellants.

(May 20, 1915.)

ORLO URICH, Respondent, v. GEORGE F. MCPHERSON
et ux., Appellants.

[149 Pac. 295.]

SALE OF TOWN LOTS—DEED IN ESCROW—LIENS—COVENANTS OF WARRANTY—ESTOPPEL.

1. Where M. executes a deed conveying certain town lots to B. and said deed is placed in escrow to be delivered to B. upon the payment of the purchase price as agreed, and thereafter B. has certain improvements placed on said lots, and then sells said lots to U., and U. has full knowledge of said transactions and is advised by M. and others that said improvements have not been paid for and that liens may be filed against said lots, and U. takes the advice of his attorney that the time for filing liens had passed, and purchases said lots from B. and pays to M. the balance due from B. on the purchase price of said lots, and pays to B. the balance of the purchase price which he had agreed to pay to B. for said lots, and in order to save the expense of recording two deeds, it is arranged that the escrow deed should be destroyed and that M. should convey said lots direct to U., which he did, *held*, under the facts that although M. conveyed to U. by grant, bargain and sale deed, he did not warrant the title to said lots against liens thereafter filed for the construction of said improvements.

2. *Held*, under the facts of this case that U. is estopped from claiming that M. warranted the title to said lots as against said liens.

APPEAL from the District Court of the Second Judicial District for the County of Idaho. Hon. Edgar C. Steele, Judge.

Action to recover on an alleged warranty the amount paid to relieve the property involved from mechanics' or laborers' liens. Judgment for plaintiff. *Reversed*.

H. Taylor and W. N. Scales, for Appellants.

If the theory of the plaintiff is correct that under the facts the warranty in his deed bound him, there were no liens or

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claims on the lots for which he or McPherson were responsible or for which there could be a foreclosure of the lien. (*Steel v. Argentine Min. Co.*, 4 Ida. 505, 95 Am. St. 144, 42 Pac. 585.)

The implied covenants in a deed by the use of the word "grant" do not include encumbrances done, made or suffered by the grantor unless he was under personal obligation to pay it. (*Polak v. Mattson*, 22 Ida. 727, 128 Pac. 89.)

It is well settled that parol evidence is admissible to show the state of facts existing at the time of the conveyance and that the land was taken subject to the encumbrances of which the purchaser had knowledge, and to show that while a warranty deed was given the maker of the deed should not be held to said warranty when it was understood and agreed between the parties that he was not to be so held. (*Allen v. Lee*, 1 Ind. 58, 48 Am. Dec. 352; *Hays v. Peck*, 107 Ind. 389, 8 N. E. 274; *Fitzer v. Fitzer*, 29 Ind. 468; *Laudman v. Ingram*, 49 Mo. 212; *Carver v. Louthain*, 38 Ind. 530; *Watts v. Welman*, 2 N. H. 458; *Pitman v. Conner*, 27 Ind. 337; *Maris v. Iles*, 3 Ind. App. 579, 30 N. E. 152; *Young v. Stampfer*, 27 Wash. 350, 67 Pac. 721.)

W. H. Casady, for Respondent.

The effect of the use of the word "grant" in a conveyance of real property is defined in sec. 3120, Rev. Codes, and the word "encumbrance" is defined in sec. 3121, and establishes beyond question that the deed in question was a warranty deed and warranted against the encumbrance of the liens which the plaintiff had to pay to protect his title to the lots.

SULLIVAN, C. J.—This is an appeal from a judgment rendered in favor of the plaintiff for damages on account of an alleged warranty in a deed executed by the defendants to the plaintiff for certain lots in the village of Cottonwood, Idaho county.

The following facts appear from the record:

About the 1st of August, 1908, the defendant, McPherson, entered into a contract with one Beatty whereby he sold to

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Beatty four town lots for the agreed price of \$250, to be paid in monthly payments of ten dollars each. A deed was placed in escrow in the German State Bank to be delivered to said Beatty when the full purchase price was paid. Under that agreement Beatty paid fifty dollars. He then sold said lots to the plaintiff for \$400. After Beatty had purchased said lots and before he had sold them to Urich, he caused to be erected on said lots certain buildings and improvements. The plaintiff was informed of the deal between McPherson and Beatty and knew of the improvements which Beatty had placed on said lots prior to his purchase from Beatty, as he lived just across the street from said lots.

Before completing the deal with Beatty, plaintiff had a talk with McPherson and informed him that he could purchase said lots cheap from Beatty and intended to make the deal. Thereupon McPherson advised plaintiff of the possibility of liens on said lots for the improvements which Beatty had placed thereon. The plaintiff went to Judge Duffey, a practicing attorney, to get his advice in regard to liens, and was informed by said attorney that the time for filing liens for the improvements placed on said land had already passed. The plaintiff also had a conversation with the president of the German State Bank (in which bank said deed was placed in escrow), who also advised him to look out for liens on said property. Hendrickson, the contractor who had placed some of said improvements on said lots, also informed the plaintiff of his claim and the claim of another contractor or laborer against said lots on account of said improvements. The plaintiff thereupon advised Hendrickson to come downtown at the time he was to pay the money to Beatty and he would see that he got his money. Hendrickson appeared at the time and place suggested by the plaintiff, but the plaintiff failed to appear. Plaintiff closed said deal with Beatty and paid him for said lots, or paid the balance of the purchase price to McPherson, amounting to about \$209, and the balance of the purchase price to Beatty. Thereupon, at the request of Beatty and with the acquiescence of the plaintiff, it was understood between the plaintiff, McPherson and Beatty that

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as a matter of convenience and to save the recording of the deed from McPherson to Beatty, which had been placed in escrow, the escrow deed should be withdrawn and destroyed and a new deed be made from McPherson to the plaintiff to take the place of said deed in escrow; and it was fully understood and agreed that by said deed from McPherson to the plaintiff Beatty was conveying said lots and improvements to Urich. The purchase by plaintiff was from Beatty and not from McPherson. It clearly appears that McPherson did not intend to warrant or guarantee against any liens or encumbrances on said lots caused by said Beatty. The clear intention was that McPherson was to receive the unpaid balance that Beatty owed him on the lots and the remainder of the purchase price should go to Beatty, and that McPherson should not warrant the title to said lots from the acts of Beatty. The parties to the transaction fully understood the matter as stated.

After the plaintiff had fully investigated the probability of any liens being filed against said property because of the improvements placed thereon by Beatty, and being advised by his own attorney that the time for filing said liens had passed, Urich, the plaintiff, made the deal with Beatty for the purchase of said lots. After the purchase price from Beatty was paid to McPherson, Beatty was entitled to the delivery of said escrow deed and thereunder became the holder of the legal title. By mutual consent said deed was delivered or taken up and the deed referred to was made by McPherson, conveying the land to the plaintiff.

Thereafter liens were filed for labor, supplies and material contracted for by Beatty in the placing of said improvements on said lots, and McPherson was in no manner connected with said transaction. The plaintiff was thereafter compelled to pay the amount of said liens and brought this suit to recover the amount so paid.

But it is contended by respondent that said deed from McPherson to the plaintiff is a warranty deed, warranting the title against said liens and claims and that the terms of said warranty cannot be changed by parol evidence.

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Under the facts of this case, we cannot agree with that contention. From the whole record it is clear that McPherson did not intend to warrant the title against said liens. The plaintiff was fully advised of the conditions and facts in regard to said liens, and he took his attorney's advice to the effect that the time for filing said liens had passed and for that reason they could not be made valid liens against said property. The Banker Nuxoll also advised him to be careful about those claims. The contractor himself advised him that he claimed a lien and the plaintiff arranged with him to be present when he paid the purchase price to Beatty, and that he, the contractor, would at that time receive the money due him for the improvements he had placed on said lots. The plaintiff disregarded said arrangement and paid Beatty with the full knowledge of all the facts in regard to the claims against said lots. McPherson was under no obligation to pay said liens; and he did not intend to, nor did he, under the facts, warrant the title against said lien claims.

This court held in *Polak v. Mattson*, 22 Ida. 727, 128 Pac. 89, that implied covenants in a deed by the use of the word "grant" do not include encumbrances done, made or suffered by the grantor unless he was under personal obligation to pay them. McPherson was under no obligation to pay for said improvements. He had already executed a deed to said lots and placed it in escrow to be delivered upon the payment of the purchase price. The doctrine is well established that parol evidence is admissible to show the true facts existing at the time of a conveyance and that the land taken was conveyed subject to encumbrances of which the purchaser had full knowledge, and to show that while the warranty deed was given, the maker of the deed should not be held on a warranty when it was understood and agreed between the parties that he was not to be so held.

In *Allen v. Lee*, 1 Ind. 58, 48 Am. Dec. 352, the trial court held that parol evidence to show that the purchaser purchased the land subject to the lease of one Prichard was in contradiction to the terms of the warranty in the deed, and therefore

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inadmissible. The supreme court, in regard to that matter, said:

“We think this view of the case was erroneous. . . . We are of the opinion that if the covenant had been properly worded, the evidence rejected should have been admitted, not to contradict the deed or to give a construction to the contract contrary to the written terms of it, but as a part of the *res gestae* to prove the state of facts existing at the time of the conveyance, and that the encumbrance in question was not within the purview of the contract.”

In *Maris v. Iles, Administrator*, 3 Ind. App. 579, 30 N. E. 152, the court held that under a deed of general warranty it may be established by parol that the grantee undertook to pay any particular lien or discharge any encumbrance as part of the consideration, where the deed is silent upon the subject.

Now, it is evident under the facts of this case that McPherson never intended to warrant against the liens referred to, and it is equally clear that the plaintiff knew that he did not intend to do so; that in regard to that he relied upon the advice of his attorney to the effect that the time for filing said liens was passed. As bearing on this question, see, also, *Hays v. Peck*, 107 Ind. 389, 8 N. E. 274; 11 Cyc. 1123.

Plaintiff did not in terms agree to discharge said liens, but proceeded upon the theory that there were no liens, and he well understood that McPherson did not intend to warrant against such liens. The plaintiff stands in the same position that he would if he had agreed to pay said liens himself. (See, also, *Watts v. Welman*, 2 N. H. 458.)

The rule laid down in the case of *Young v. Stampfer*, 27 Wash. 350, 67 Pac. 721, is clearly the rule applicable to the case at bar under the facts presented. In that case a grantee in a warranty deed sued for a breach of the covenants against encumbrances, and it was there held that parol evidence was admissible to show that the grantor having purchased on execution sale and the land having been redeemed by the execution debtor, the warranty deed was given to plaintiff at the

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request of the debtor on an understanding that the same was merely a redemption deed and that it should have no effect as a warranty. The court said:

“Under our system equitable relief is given in actions at law. The evidence to support the affirmative defense of the defendants was not introduced to control or vary the covenant in the deed, but to prevent the enforcement of the same, because it was obtained in such a manner that it would be a fraud upon the covenantors to allow the enforcement of the covenants. In such a case oral evidence is admissible. . . . Equitable estoppels are based on the ground of promoting the equity and justice of the individual case by preventing the party from asserting his rights under a general technical rule of law when he has so conducted himself that it would be contrary to equity and good conscience for him to allege and prove the truth.”

Now, in the case at bar, Beatty purchased from McPherson, and if Beatty had paid the balance due on the purchase price and recorded the escrow deed, McPherson would not have been liable for said liens, and in executing said deed to the plaintiff at the request of Beatty and consent of plaintiff, he had no intention of warranting the title against any acts done by Beatty subsequent to the time said deed was placed in escrow, and it would be most inequitable and unjust, under the facts in this case, to require McPherson to pay the amount of said liens out of the purchase price of \$250 agreed to be paid by Beatty to him for said lots. It was not McPherson's intention to guarantee the title against said liens, and the plaintiff well knew that McPherson did not intend to warrant the title against such liens, but concluded, on the advice of his attorney, that such liens did not exist or that the time for filing them had passed. And it would be most unjust and inequitable, under the facts of this case, to require McPherson to pay the amount of said liens when he never intended to warrant against them, and the purchaser well knew that he did not intend to do so.

The judgment must therefore be reversed and the cause remanded, with instructions to enter judgment in favor of

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the defendants in accordance with the views expressed in this opinion. Costs awarded to the appellants.

BUDGE, J., Concurring Specially.—I concur in the conclusions reached by Chief Justice Sullivan in the above-entitled cause, but in doing so and to make my position clear desire to set forth the following additional reasons why, in my opinion, this judgment should be reversed and the cause remanded with instructions to enter up judgment in favor of the appellant.

When McPherson entered into the contract referred to in the statement of facts in this case, whereby he sold to Beatty the four lots for the agreed price of \$250, to be paid in monthly instalments of \$10 each, and placed the deed in escrow in the German State Bank to be delivered to Beatty when the full purchase price was paid, and when, in pursuance of said agreement, Beatty paid \$50 on the purchase price and went into possession of said lots, the equitable title to the lots in question vested in Beatty; and when McPherson was paid the balance of the purchase price due upon the lots, the legal title to said lots, by operation of law, immediately vested in Beatty, where, under the facts in this case, it still rests.

The principle of law adhered to in the case of *Cannon v. Handley*, 72 Cal. 133, 13 Pac. 315, is applicable to the case at bar, viz., upon performance by grantee of the conditions upon which a deed is delivered in escrow, the depository becomes the custodian of the grantee and his possession is the possession of the latter. The deed takes effect the moment the conditions are performed without any formal delivery into the hands of the grantee. And in the case of *Shirley v. Ayres*, 14 Ohio, 307, 45 Am. Dec. 546, the court said: "It is not essential to the validity of a deed that it be actually delivered to, or ever pass into the hands of, the grantee."

Urich, being a party to this transaction and acting in conjunction with Beatty and McPherson, with full knowledge of the transfer of title to the lots from McPherson to Beatty, and of the attempted transfer of the title to said lots

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from McPherson to himself by the destruction of the deed from McPherson to Beatty, cannot now be heard to complain of certain liens which attached to these lots by reason of the improvements made upon the same by Beatty subsequent to the execution of the deed from McPherson to Beatty, which liens thereafter ripened into a valid and subsisting claim against the lots, for the satisfaction of which the lots in question ultimately became liable.

1 Devl. on Deeds, sec. 300, contains the following rule:

“When a deed has been properly executed and delivered, it operates as a transfer of title. Its redelivery to the grantor or its cancelation cannot operate as a retransfer of the title so conveyed. Where it has once become effective, it cannot be defeated by any act occurring afterward, unless it be by force of some condition contained in the deed itself. . . . ‘The decided weight of authority is that the surrender of a deed, though not registered, will not operate to revest the grantor with the title.’ The fact that both grantor and grantee suppose that a deed will not take effect until recorded, and might be revoked at any time before that is accomplished, does not alter its legal character as a conveyance where it has been delivered to the grantee. . . . The title remains in the grantee when it has once become vested in him, notwithstanding the destruction of the deed or its return to the grantor, and although the latter has, through the direction of the grantee again executed a deed to another.” (*Rittenhouse v. Clark*, 110 Ky. 147, 61 S. W. 33.)

The preponderance of authority is to the effect that the surrender or destruction of a deed by agreement of the parties will not operate to revest the grantor with the title. Where a grantor has executed a second deed for the same land through a misunderstanding, whereby he has become liable on the covenant of warranty in the second deed to a third party, who had knowledge of the execution and delivery of the first deed, equity will relieve him by canceling the second deed. (*Strawn v. Norris*, 21 Ark. 80.)

In the case at bar, Urich had full knowledge that a deed had been made for these lots by McPherson to Beatty, and

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he was a party to the destruction of the deed made by McPherson to Beatty. Hence, he dealt with his eyes open as to the real condition of the title to the property and of the existence of the indebtedness incurred by Beatty for improvements placed upon the property during Beatty's possession. Urich knew that Beatty owed the lienholders at the time the deed was destroyed, and he believed, in common with McPherson and Beatty, that the time for filing the liens had expired and that the lienholders could not satisfy their obligation out of the property, and that unless Beatty could personally respond for the amount of the indebtedness, the lienholders would be defeated. It is clear to my mind that McPherson never undertook to be responsible for the indebtedness incurred during the possession of Beatty, and that Urich understood, at the time the deed was destroyed and a new deed executed and delivered by McPherson, that McPherson was not to be held for an indebtedness incurred, or encumbrance done, made or suffered, during the possession of Beatty. It was no accommodation to McPherson to have the deed destroyed, but it was an accommodation to Beatty and Urich to avoid the expense of recording the deed from McPherson to Beatty and the making and recording of a deed from Beatty to Urich.

There are some cases which hold that the deed must be surrendered for the very purpose of revesting title, and where it is redelivered for any other purpose, such surrender will neither divest the grantee of the title, nor operate as an estoppel against him. (*Bunz v. Cornelius*, 19 Neb. 107, 26 N. W. 621; *Dycus v. Hart*, 2 Tex. Civ. 354, 21 S. W. 299.) In the case at bar, the real purpose for the surrender of the deed from Beatty to McPherson was to save expense.

In cases which are found in the books, where the surrender and cancelation of deeds conveying lands have been held, as between the parties, to revest the estate in the grantor, the deeds have not only been unrecorded, but were surrendered soon after their execution and delivery, and the parties were in fact restored to the same identical position, or to what was equivalent, that they stood in before the conveyance was made.

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(*Patterson v. Yeaton*, 47 Me. 308.) In the present case, if this latter rule be adopted, McPherson would not occupy the same position, or what was equivalent, that he stood in before the second conveyance was made. He would be held liable for the indebtedness created by Beatty during his possession, for which liens attached subsequent to the making of the first deed and prior to the making of the second.

In *Weygant v. Bartlett*, 102 Cal. 224, 36 Pac. 417, the court said: "Where a purchaser of property has the title made to another as a matter of convenience,—such other conveying it to him on the same day,—such other is not the purchaser's trustee, as to the land, though the latter conveyance is delivered back to him by the purchaser, and destroyed, with the purchaser's consent, since, on the delivery of the deed to the purchaser, the legal title passed, and the subsequent destruction thereof could not affect the title."

The oral agreement entered into between McPherson, Beatty and Urich that, in order to avoid the expense incident to the recording of the deed from McPherson to Beatty and making and recording a deed from Beatty to Urich, the deed already executed and delivered by McPherson to Beatty be destroyed and McPherson make a deed direct to Urich would not, under the facts in this case, divest Beatty of the legal or equitable title to the lots in controversy. McPherson, having conveyed the lots in question by deed to Beatty, could not make a valid conveyance of these lots from himself to Urich. And Urich, who had full knowledge of this fact, accepted the deed from McPherson to himself, fully realizing that McPherson, not being possessed of the fee, did not covenant or warrant against liens created against lots of which he was not the owner. Under the laws of this state, real estate cannot be conveyed by oral agreement. Beatty, having become vested with the title to said lots by a proper deed of conveyance, under the laws of this state, cannot divest himself of such title except by a proper deed of conveyance as prescribed by law. The destruction of the evidence of title does not destroy the actual title. In *Regan v. Howe*, 121 Mass. 424, the court said:

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“The destruction or detention of the deed by the grantor, after such delivery, cannot divest the grantee’s estate.”

While, as between Beatty and Urich, the principle of estoppel might apply, as between Beatty’s creditors and heirs, this principle, in my opinion, would not apply under any circumstances. In *Botsford v. Morehouse*, 4 Conn. 550, the grantee, finding himself unable to pay all the purchase money, returned the deed to the grantor for the purpose of revesting him with title and a creditor of the grantee levied upon the land; and it was held that the levy was effective, for the reason that the title still resided in the grantee. (See, also, *Raynor v. Wilson*, 6 Hill (N. Y.), 469; *Hinchliff v. Hinman*, 18 Wis. 130; *Cunningham v. Williams*, 42 Ark. 170; *Warren v. Tobey*, 32 Mich. 45.)

MORGAN, J., Dissenting.—I dissent from the conclusion reached by the majority of the court in this case and find myself entirely unable to follow the reasoning employed in reaching it.

Both the appellants and the respondent fully understood that the improvements which had been made for which the liens were subsequently filed had not been paid for at the time of the execution and delivery of the deed from McPherson and wife to Urich, and they all erroneously believed the time for filing such liens had expired. The record discloses nothing from which it may be inferred that any of the parties understood at the time the deed was made that any act of Beatty had created a lien or encumbrance upon the property. Upon the other hand, it clearly appears that the appellants thought they were giving and the respondent thought he was receiving a clear title. Laboring under this misunderstanding, the appellants made, executed and delivered to respondent a deed in which the following is recited: “That the parties of the first part . . . do by these presents grant, bargain, sell, convey and confirm to the said party of the second part his heirs and assigns forever all the following described lots, pieces and parcels of land situated in the county of Idaho and state of Idaho, known and described as follows,

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to wit: And that said parties of the first part and their heirs the said premises in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, shall and will forever warrant and defend."

Sec. 3120, Rev. Codes is as follows:

"From the use of the word 'grant' in any conveyance by which an estate of inheritance, possessory right, or fee simple is to be passed, the following covenants, and none other, on the part of the grantor, for himself and his heirs, to the grantee, his heirs and assigns, are implied, unless restrained by express terms contained in such conveyance:

"1. That previous to the time of the execution of such conveyance the grantor has not conveyed the same estate, or any right, title or interest therein, to any person other than the grantee;

"2. That such estate is at the time of the execution of such conveyance free from encumbrance done, made or suffered by the grantor, or any person claiming under him. Such covenants may be sued upon in the same manner as if they had been expressly inserted in the conveyance."

The case of *Polak v. Mattson*, 22 Ida. 727, 128 Pac. 89, is cited in support of the position "that implied covenants in a deed by the use of the word 'grant' do not include encumbrances done, made or suffered by the grantor unless he was under personal obligation to pay it." I am unable to construe that decision as establishing a general rule, applicable to all cases, to the effect above stated, for said case only decides that certain taxes which became a lien upon the property before the grantor acquired title to it were an encumbrance "done, made or suffered" by her or by any person claiming under her.

Whatever interest in the property Beatty had at the time the indebtedness was incurred, to secure the payment of which the liens were filed, was by virtue of the deed in escrow from appellants, and whatever claim he had was a claim under them.

It is believed the Chief Justice has quoted sufficiently from the case of *Young v. Stampfer*, 27 Wash. 350, 67 Pac. 721,

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to distinguish it from this. No element of fraud enters into this case and the appellants did what they intended to do, i. e., gave the respondents a title which they warranted to be clear of encumbrance. Their present cause for complaint arises from their misunderstanding as to the validity of the claims of lien.

The Indiana cases and the case of *Watts v. Welman*, 2 N. H. 458, cited in the majority opinion, are to the effect that a covenant of warranty in a deed does not extend to a known encumbrance which the grantee agreed to discharge, particularly if the amount of the encumbrance has been deducted from the purchase price or consideration for which the transfer was made, and that parol evidence may be introduced to establish such facts and to show the real consideration. Probably no authority can be found which extends the rule further than above stated, and it is a departure from well-established principle to hold that the grantor in a warranty deed may escape the consequence of his covenant of warranty because neither himself nor the grantee knew of the existence of an encumbrance or other defect in the title at the time the deed was made.

It nowhere appears in the record that the amount of the claims for which the liens were filed was discussed between the parties or deducted from the purchase price or that respondent assumed or agreed to pay them. It does, however, appear that he insisted upon a warranty deed and an abstract showing a clear title. These the appellants gave him.

It is clear that the claims for which the liens were filed were encumbrances as defined in sec. 3121, Rev. Codes, and it is equally clear that they were "done, made or suffered" by Beatty at a time when he was claiming under the appellants, who were grantors in the deed to respondent, and since there is nothing expressed in the deed in any manner modifying or restraining the covenants of warranty implied by the use of the word "grant," it follows, as a matter of law, that the agreement of the parties was to the effect that the grantors, appellants here, would hold the grantee therein named, the

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respondent in this case, harmless from such liens should they be filed and enforced.

I encounter equal difficulty in attempting to follow the reasoning employed by Justice Budge in his concurring opinion.

Assuming that at the time the appellants executed and delivered their deed to respondent the title was not in them, but was in Beatty (which I do not deem it necessary here to decide), the maker of a warranty deed is, by said opinion, placed in position to contend as follows: "I attempted to convey by warranty deed property which I had already conveyed away and the grantee, being aware of the facts, must have, as a matter of law, inferred that I had no title to convey and none to warrant." Such a defense is anticipated and prevented by subdivision 1 of sec. 3120, *supra*.

The rule of law applicable to this case is clearly stated in 11 Cyc. 1066 as follows: "The fact that either or both of the parties knew at the time of the conveyance that the grantor had no title in a part or in the whole of the land does not affect the right of recovery for a breach of covenant.

"Knowledge on the part of the purchaser of the existence of an encumbrance on the land will not prevent him from recovering damages on account of it, where he protects himself by proper covenants in his deed. . . . Manifestly there is no breach where the grantee knowingly assumes the encumbrance."

I believe the judgment of the trial court should be affirmed.

Points Decided.

(May 20, 1915.)

W. A. ANDERSON, Appellant, v. ANDREW COOLIN, W. B. MITCHELL, Trustee, E. H. BERG, Trustee, CHARLES W. BEARDMORE, and WASHINGTON TRUST CO., a Corporation, Respondents.

[149 Pac. 286.]

ADMISSION AND PRACTICE OF ATTORNEYS—STATUTORY REQUIREMENTS—
APPEARANCE OF FOREIGN ATTORNEYS IN DISTRICT AND SUPREME
COURTS—HOW REGULATED—MOTION TO STRIKE IMPROPER BRIEF
SUSTAINED.

1. Section 3990, Rev. Codes, provides: "Any citizen or person, resident of this state, or who has *bona fide* declared his intention to become a citizen in the manner required by law, of the age of twenty-one years, of good moral character, and who possesses the necessary qualifications of learning and ability, is entitled to admission as attorney and counselor in all courts of this state." But, before being admitted as such attorney and counselor, as provided by sec. 3991, Rev. Codes, as amended by Sess. L. 1909, p. 110, "must produce satisfactory testimonials of good moral character and . . . undergo a strict examination in open court as to his qualifications, by the justices of the supreme court." Sec. 3994, Rev. Codes, as amended by Sess. L. 1911, p. 338, provides: "The examination may be dispensed with in the case of any person who has been admitted to practice law under license or certificate from the highest court of another state or territory, and has thereafter actually engaged in the practice of law as a principal occupation for not less than three years immediately preceding with [the] date of application for admission to practice in this state, and who is in good standing as such."

2. Sec. 3995, Rev. Codes, provides: "Each clerk must keep a roll of attorneys and counselors admitted to practice by the court of which he is clerk, which roll must be signed by the person admitted before he receives a license."

3. Sec. 3996, Rev. Codes, provides in substance that if any person shall practice law in this state in any court, except a justice's court, without having received a license as attorney and counselor, he is guilty of a contempt of court.

4. Under the amendment to sec. 3991, Rev. Codes, *supra*, the admission of attorneys of sister states and territories to practice in all the courts of this state is placed wholly within the jurisdic-

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tion of the supreme court of this state, and the law does not authorize the admission of such attorneys by the district courts.

5. Subdivision 4 of sec. 4002, Rev. Codes, provides, as one of the causes for which an attorney may be disbarred or suspended: "Lending his name to be used as an attorney and counselor by any other person who is not an attorney and counselor," and regularly admitted to practice.

6. Sec. 4198, Rev. Codes, provides: "All pleadings filed in the district courts or supreme court of this state shall be signed by a resident attorney of the state of Idaho, who shall state his residence or postoffice address; and the name of a resident attorney shall be indorsed on all summons issued out of the district courts, and all pleadings required to be verified shall be verified by a party to the action, or any attorney residing in the state of Idaho and regularly admitted to practice in the courts of this state."

7. Nonresident attorneys, who are admitted to practice in this state under section 3994, Rev. Codes, as amended, *supra*, in order that they may be permitted to appear in the courts of this state, must associate with them a resident attorney who has been regularly admitted to practice in the courts of this state, who shall be held primarily responsible by, and answerable to, the courts of this state, for all proceedings had in connection with the litigation in which they are so employed before the courts of this state. Said employment of a resident attorney is not to be a mere subterfuge, but *bona fide* and in good faith, and for which services, said attorney is entitled to charge and receive adequate compensation.

8. Upon motion, an order will be made by this court striking the name of a person who has not been regularly admitted to practice in the courts of this state, or by comity extended upon application by the court, from all original files and briefs, where the name of said person appears; and he will be denied the right to appear in this court, or the district courts of this state, as an attorney and counselor, until he has fully complied with all of the requirements of the statutes of this state governing the admission of attorneys and counselors to practice law in this jurisdiction.

9. A motion will be sustained to strike from the files, briefs couched in language disrespectful to the court and court officers, and unbecoming an attorney and officer of the court.

Motion to strike from all papers filed in a cause the name of an attorney not admitted by law to practice in this state; and to strike from the files in the case a brief couched in language disrespectful to the court and court officers, and unbecoming an attorney, which motion was sustained.

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J. F. Ailshie, E. N. La Veine and Peacock & Ludden, for Appellant.

W. F. McNaughton, for Respondents.

Counsel file no briefs on motion to strike.

BUDGE, J.—W. B. Mitchell appeared in the district court of the eighth judicial district as an attorney in the case wherein W. A. Anderson was plaintiff and Andrew Coolin, W. B. Mitchell, trustee, E. H. Berg, trustee, Charles W. Beardmore and Washington Trust Co., a corporation, were defendants. An appeal from the judgment in said cause is now pending in this court, in which the said W. B. Mitchell appears as attorney for the respondents, in whose behalf he prepared, filed and served upon counsel for the appellants a brief in said cause. On May 1st, 1915, counsel for appellant filed a motion in this court “to strike from all the papers and files originally filed in this court the name of W. B. Mitchell as attorney for respondent, . . . upon the ground that the said W. B. Mitchell is not an attorney admitted or entitled to practice in the courts of Idaho, and upon the further ground that the district court has no power or authority to permit an attorney to practice law in this state, and particularly no authority to permit or grant him leave to appear in this court, and that the district judge, from whose decision this appeal is prosecuted, has never pretended or purported to grant such leave, and upon the further ground that the records and files in this case show that the said W. B. Mitchell is not entitled to be extended the right to appear as attorney for any litigant by courtesy or otherwise.”

Sec. 3990, Rev. Codes, provides: “Any citizen or person, resident of this state, who has *bona fide* declared his intention to become a citizen in the manner required by law, of the age of twenty-one years, of good moral character, and who possesses the necessary qualifications of learning and ability, is entitled to admission as attorney and counselor in all courts of this state.”

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Sec. 3991, Rev. Codes, as amended by Sess. L. 1909, p. 110, provides: "Every applicant for admission as an attorney and counselor must produce satisfactory testimonials of good moral character, and, except as hereinbefore provided, undergo a strict examination in open court as to his qualifications, by the justices of the supreme court."

Sec. 3992, Rev. Codes, provides: "If, upon such examination in the supreme court, the applicant is found qualified, the court shall admit him as attorney and counselor in all the courts in this state, and shall direct an order to be entered to that effect upon its record, and that a certificate of such record be given to him by the clerk of the court, which certificate is his license."

Sec. 3993, Rev. Codes, provides: "Every person, before receiving license to practice law, shall take the oath prescribed by law, and shall pay to the state treasurer the sum of twenty-five dollars for the use of the state library fund, and the clerk of the court shall require of the person so admitted the receipt of the said treasurer, before issuing such license, and in no case shall the oath be administered or the license issued until such receipt is produced and filed in the office of the clerk."

Sec. 3995, Rev. Codes, provides: "Each clerk must keep a roll of attorneys and counselors admitted to practice by the court of which he is clerk, which roll must be signed by the person admitted before he receives a license."

Sec. 3996, Rev. Codes, provides: "If any person shall practice law in any court, except a justice's court, without having received a license as attorney and counselor, he is guilty of a contempt of court."

The district courts of this state, prior to the amendment of section 3991, Rev. Codes, *supra*, were authorized to admit applicants to practice as attorneys and counselors in the district courts of this state, upon like testimonials and examinations as are required now to be furnished and taken in the supreme court; but are not now so authorized.

Sec. 3997, Rev. Codes, provides the duty of an attorney and counselor, by the provisions of which he is required, *inter*

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alia, to support the constitution and laws of the United States and this state, and to maintain the respect due to the courts of justice and judicial officers. Rules of duty are further prescribed in this section, which are intended to regulate and control the conduct of attorneys and counselors with regard to the public and to those in whose behalf they appear in court and exercise their appropriate functions.

Sec. 4002, Rev. Codes, provides that an attorney is subject to the authority of the courts and may be, for cause shown, suspended or removed and deprived of the right to pursue his profession, by the supreme court. This may be for any of the causes enumerated in said section, arising after his admission to practice. Subdivision 4 of sec. 4002, *supra*, provides, as one of the causes for which an attorney may be removed or suspended, the following:

“Lending his name to be used as an attorney and counselor by any other person who is not an attorney and counselor.”

Said subdivision applies to regularly admitted resident attorneys of this state who, with knowledge, permit the use of their names by persons who have not been admitted either upon examination before the supreme court of this state, or upon motion as provided by sec. 3994, Rev. Codes, as amended by Sess. L. 1911, p. 338, resulting in such unauthorized persons appearing as attorneys and counselors in the courts of this state.

All of the foregoing provisions of the statute were enacted, not only in the interest of those who employ the services of attorneys, but in the interest of the public at large.

Sec. 3994, Rev. Codes, as amended, *supra*, provides:

“The examination may be dispensed with in the case of any person who has been admitted to practice law under license or certificate from the highest court of another state or territory, and has been thereafter actually engaged in the practice of law as a principal occupation for not less than three years immediately preceding with [the] date of application for admission to practice in the state, and who is in good standing as such. The court shall, before admitting such person, require the production of his license or certificate and an

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affidavit of his standing, and shall satisfy itself by questioning the applicant under oath, and such other means as it may adopt, that he has been engaged in actual practice as above stated.”

It will be conceded that the terms and conditions of the admission of an attorney to practice law, or to continue in the practice of law, as well as his powers, duties and privileges, are proper subjects of legislative control, to the same extent and subject to the same limitations as in the case of any other profession or business that is created or regulated by statute. It is a privilege or franchise that is extended by legislative enactment, conditioned upon a compliance with the statutes regulating the practice of the law and the conduct of the attorney in his private life and dealings with the public, and the respect due the courts of justice and judicial officers. The legislature may rightfully provide under what circumstances and conditions attorneys may appear before the courts of this state in the practice of their profession, as well as provide that certain acts shall have been performed before the machinery of the courts is put in operation.

Sec. 4198, Rev. Codes, provides: “All pleadings filed in the district courts or supreme court of this state shall be signed by a resident attorney of the state of Idaho, who shall state his residence or postoffice address; and the name of a resident attorney shall be indorsed on all summons issued out of the district courts, and all pleadings required to be verified shall be verified by a party to the action, or any attorney residing in the state of Idaho and regularly admitted to practice in the courts of this state.”

Where nonresident attorneys are admitted to practice in this state under sec. 3994, as amended, *supra*, it is necessary, in order that they be permitted to appear in the courts of this state, that they have associated with them a resident attorney, whose name shall appear upon all pleadings filed in the district court or in the supreme court, and whose residence or postoffice address shall be indorsed upon the summons issued out of the district court; and all pleadings required to be verified shall be verified by a party to the action, or any at-

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torney residing in the state of Idaho and regularly admitted to practice in the courts of this state. This section is intended to provide for the employment of a resident attorney of this state, who shall be held primarily responsible by, and answerable to, the courts of this state, for all proceedings had in connection with the litigation before the courts. The employment of resident attorneys under this section is not to be considered as a mere subterfuge, or that there is a compliance with the spirit of said section, where an arrangement is made that the name of an attorney may be used as an accommodation, only. The employment must be *bona fide* and in good faith. Courts will look to resident counsel in the first instance, and require at their hands the same careful consideration and attention to the business that is entrusted to their care, when associated with counsel of sister states or territories, as if they were conducting such cases alone. Their liability will, in every respect, be the same when associated with counsel who are not residents of the state, as it would under any other circumstances. An attorney of this state lending his name to be used as an attorney and counselor by any other person who is not an attorney and counselor, within the meaning of the provisions of our statutes regulating the right to practice law in this state, is subject to disbarment, and for that reason, resident counsel are entitled to charge and exact an adequate fee for services rendered when associated with counsel who are not residents of this state.

It is conceded that W. B. Mitchell has not been admitted to practice law in this state under the provisions of sec. 3991, Rev. Codes, as amended, *supra*, or under the provisions of sec. 3994, Rev. Codes, as amended, *supra*; in other words, the said W. B. Mitchell has not been admitted either upon an examination in open court, or under license or certificate from the highest court of another state or territory, under which certificate or license, he has been engaged in the practice of law as a principal occupation for not less than three years immediately preceding the date of application for admission to practice in this state. This being true, his ap-

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pearance in this court, as well as in the district court, was not authorized by the laws of this state.

We do not wish to be understood as holding that the district courts, as well as this court, have not the inherent power, as a matter of comity, to permit an attorney from a sister state or territory to present argument in any pending case, but even this prerogative should not be abused, and where attorneys from sister states or territories have business which requires their intermittent appearance in the courts of this state, it is quite proper that they should comply with the provisions of the laws of this state regulating the right to engage in the practice of their profession within this jurisdiction.

It is, therefore, ordered that the name of the said W. B. Mitchell as an attorney be, and the same is, hereby, stricken from all of the papers and files originally filed in this court; and it is further ordered that the said W. B. Mitchell is hereby prohibited from further appearing as an attorney in this court, or in the district courts of this state, until such time as he has fully complied with the provisions of the statutes of this state regulating the right of an attorney to engage in the practice of law in this jurisdiction.

Counsel for appellant also moved this court "to strike from the files the brief entitled 'Respondents' Answer Brief,' and signed as follows: 'W. B. Mitchell, Attorney for Respondents by leave of District Court,'" for the reason that said brief is "couched in language disrespectful to the court and court officers and unbecoming an attorney and officer of the court, and that it is devoted largely and chiefly to personalities, vituperation and abuse which is in no way connected with or supported by the record in the case. . . ."

We have examined the brief designated "Respondents' Answer Brief," and find that it is subject to the motion, and is devoted largely to personalities, vituperation and abuse directed against one of the attorneys for the appellant which, from the facts in this case, are unwarranted, and can be of no assistance to this court in reaching a correct determination of the legal questions involved. Respondents' answer brief is

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hereby stricken from the files. The respondents in this case, however, are allowed thirty days within which to file and serve a substitute brief in lieu of respondents' answer brief.

Sullivan, C. J., and Morgan, J., concur.

(May 22, 1915.)

RALPH A. COLLMAN, Appellant, v. KLEIN WANAMAKER, Member of the Board of Trustees of the Village of Hope, a Municipal Corporation, Respondent.

[149 Pac. 292.]

APPEAL—MOTION TO DISMISS—MUNICIPAL OFFICERS—REMOVAL OF—
INFORMATION—DEMURRER—STATUTORY CONSTRUCTION—ILLEGAL
FEES—OFFICIAL DUTIES—NEGLECT TO PERFORM.

1. Attorneys must comply with the rules of this court in the service and filing of their briefs, and in case more time is required than the rules allow for serving such briefs, application should be made for an extension of time before the time given has expired.

2. Under the provisions of sec. 7459, Rev. Codes, providing summary proceedings for the removal of certain officers, there are only two offenses for which an action to remove a defendant may be prosecuted, to wit: (1) For charging and collecting illegal fees for services rendered or to be rendered in his office; (2) Where the officer has refused or neglected to perform the official duties pertaining to his office.

3. *Held*, that an information that charges a village officer with having sold certain merchandise to his village and collected pay therefor from the village does not charge the defendant with any offense for which he may be removed, under the provisions of said sec. 7459.

4. The word "fees" as used in said section means a reward for personal services performed or to be performed; it designates the sum prescribed by law as charges for services rendered by public officers.

5. The illegal selling of property to a municipality by an officer thereof and collecting pay therefor is not the collection of an illegal fee as contemplated by the provisions of said sec. 7459.

Argument for Appellant.

6. The case of *Robinson v. Huffaker*, 23 Ida. 173, 129 Pac. 334, cited and modified.

7. Under the provisions of sec. 255, Rev. Codes, municipal as well as other officers are prohibited from being interested in any contract made by them in their official capacity with their municipality.

8. It is not charged in the information that the defendant failed or neglected to perform an official duty, but it is charged that he did act and allow illegal claims; hence the charge does not come within the purview of said sec. 7459.

9. *Held*, that the information does not charge the defendant with any act for which he may be removed from office, under the provisions of sec. 7459, and that the court did not err in sustaining the demurrer to the information and dismissing the proceeding.

APPEAL from the District Court of the Eighth Judicial District for Bonner County. Hon. John M. Flynn, Judge.

Action to remove a village trustee under the provisions of sec. 7459, Rev. Codes. Judgment for defendant. *Affirmed*.

O. C. Granger, Peter Johnson and G. H. Martin, for Appellant.

The Utah court, under an identical statute, has held that any officer (except those who, under the constitution, can be removed only by impeachment) may be removed under the provisions of said section identical with sec. 7459. (*Skeen v. Craig*, 31 Utah, 20, 86 Pac. 487.)

The sales of merchandise and supplies to the village by the defendant were void acts. The statutes of this state have been adopted with the idea of prohibiting public officers from being interested directly or indirectly in any contract with the municipality which they represent. (*Stokey v. Commrs.*, 6 Ida. 542, 57 Pac. 312.)

Our legislature has seen fit to enact several classes of statutes relating to officials of different municipal corporations. (Rev. Codes, sec. 625; *Nuckols v. Lyle*, 8 Ida. 589, 70 Pac. 401; *Independent School Dist. v. Collins*, 15 Ida. 535, 128 Am. St. 76, 98 Pac. 857.)

Argument for Respondent.

With reference to county officials there are two statutes, one Rev. Codes, sec. 1959, relating solely to board of county commissioners, and the general statutes found in secs. 255, 256 and 257, and the attention of the court is especially directed to sec. 257. Under this section and sec. 1956 this court held that contracts for the sale of a letter-press and the rental of a barn to the county by a member of the board of county commissioners were illegal and void. (*Robinson v. Huffaker*, 23 Ida. 173, 129 Pac. 334.)

There is still another statute relating to the officers of cities and villages, namely, sec. 2279, Rev. Codes.

Under the first seventeen counts of the information in this case, there can be no doubt but that the defendant was guilty of charging and collecting from the village of Hope illegal fees within the meaning and intention of sec. 7459, Rev. Codes. (*Robinson v. Huffaker*, 23 Ida. 173-190, 129 Pac. 334; *Skeen v. Craig*, 31 Utah, 20, 86 Pac. 487.)

H. H. Taylor and E. W. Wheelan, for Respondent.

There are only two things for which a defendant can be prosecuted under sec. 7459.

"The first is charging and collecting an illegal fee for services rendered or to be rendered in his office, and, second, neglect to perform an official duty pertaining to his office." (*Corker v. Pence*, 12 Ida. 152, 85 Pac. 388.)

It certainly cannot be charged that the defendant failed or neglected to perform a duty. As a matter of fact, they did act and allow the claims. It was not neglect or refusal to perform an official duty, under the provisions of sec. 7459. (*Siebe v. Superior Court*, 114 Cal. 551, 46 Pac. 456; *State v. Norris*, 111 N. C. 652, 16 S. E. 2; 5 Words & Phrases, 4741.)

The organization of villages or towns was not authorized or recognized by the general laws of the state, at the time of the adoption of sec. 7445 to sec. 7458.

Villages did not exist by general laws at that time, and sec. 7459 was not made or intended to be applicable to the removal of village trustees or municipal officers. (*Brown v. Village of Grangeville*, 8 Ida. 784, 71 Pac. 151; *Hodges v.*

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Tucker, 25 Ida. 563, 138 Pac. 1139; *Conwell v. Village of Culdesac*, 13 Ida. 575, 92 Pac. 535.)

The collection of illegal fees was not a wilful neglect of official duties. (*Skeen v. Paine*, 32 Utah, 295, 90 Pac. 440.) The statute under which this proceeding is brought is penal and should be strictly construed, and should not be enlarged to include any facts or circumstance or offense which is not clearly within its meaning. (*Askew v. Ebberts*, 22 Cal. 263; *Crossman v. Kenniston*, 97 Cal. 379, 32 Pac. 448; *Crossman v. Leshner*, 97 Cal. 382, 32 Pac. 449; *People v. Burnside*, 3 Lans. (N. Y.) 74; 23 Am. & Eng. Ency. Law, 445.)

SULLIVAN, C. J.—This proceeding was instituted under the provisions of sec. 7459, Rev. Codes, by filing a verified information in the district court, containing eighteen causes of action, charging the defendant, as a member of the board of trustees of the village of Hope, in the first seventeen thereof, with having illegally contracted with and sold to the said village of Hope certain merchandise of different kinds, and procured the board of trustees of said village to allow and pay his claims for the merchandise so sold. It is also charged in said information that at all times when such transactions occurred, the defendant was a member and chairman of the board of trustees of said village. In the eighteenth cause of action the defendant is charged with neglect and refusal to perform his official duties as a member and chairman of the board of trustees of said village, in that he participated in the allowance of said claims presented by him and voted for the allowance thereof as a member of said board, and as chairman of said board signed the warrants of said village, payable to his own order. All of said transactions except that mentioned in the seventeenth cause of action occurred during the terms of office of said defendant that had already expired when this proceeding was brought, but the transactions set forth in the seventeenth cause of action occurred during the defendant's present term of office.

A demurrer was interposed to each cause of action set forth in said information on a number of grounds, which

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demurrer was sustained by the trial court on all of the grounds stated in the demurrer except as to the ground of uncertainty.

The plaintiff elected to stand upon his information and judgment of dismissal was thereupon entered on the 19th day of January, 1914. This appeal is from said judgment.

In limine, we are met with a motion to dismiss the appeal on the ground that the appellant failed to comply with the provisions of rules 45, 48 and 82 of this court, in that he did not serve his brief within fifteen days after the filing of the transcript and did not serve same until the 14th of November, 1914.

It appears from the record that the transcript in this case was filed on April 6, 1914, and no showing has been made that the time for serving the brief had been extended. Yet regardless of those facts, we are inclined to and do overrule the motion to dismiss since there are questions of a public nature involved in this case. However, the rules of this court are made for the guidance of attorneys, and the court expects them to comply with those rules in all matters. If an attorney requires more time than the rules allow for serving his brief, he must make application for an extension of time, under the rules, and thus proceed in an orderly way in the matter. The court expects attorneys to comply with the rules established by it, and in case they fail to do so, they jeopardize their clients' interests. The rules are made to be obeyed, not to be ignored and set at naught at the option of the attorney.

Counsel for appellant assign as error the action of the court in sustaining defendant's demurrer to each of said causes of action and rendering judgment of dismissal. The grounds of demurrer are substantially as follows:

1. That the facts stated are not sufficient to constitute a cause of action.
2. That the action is barred by the provisions of secs. 4054 and 4055, Rev. Codes.

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3. That the acts complained of were committed prior to the beginning of the present term of office of the defendant, except as to the facts stated in the 17th cause of action.

4. Uncertainty in the allegations.

5. That the court had no jurisdiction of the person of the defendant or the subject of the action.

6. That in each cause of action there has been improperly united two separate and distinct causes of action, to wit: (1) The charging and receiving of illegal fees; (2) failure and neglect in the performance of official duties.

We will first consider the sufficiency of the allegations of the information to constitute a cause of action.

Said sec. 7459, Rev. Codes, is as follows:

“When an information in writing, verified by the oath of any person, is presented to a district court, alleging that any officer within the jurisdiction of the court has been guilty of charging or collecting illegal fees for services rendered or to be rendered in his office, or has refused or neglected to perform the official duties pertaining to his office, the court must cite the party charged to appear before the court at a time not more than ten nor less than five days from the time the information was presented, and on that day or some other subsequent day, not more than twenty days from that on which the information was presented, must proceed to hear, in a summary manner, the information and evidence offered in support of the same, and the answer and evidence offered by the party informed against; and if on such hearing it appears that the charge is sustained, the court must enter a decree that the party informed against be deprived of his office, and must enter a judgment for five hundred dollars in favor of the informer, and such costs as are allowed in civil cases.”

The provisions of said section are highly penal in their nature and will not be extended to contain acts or omissions that do not come clearly within them. There are only two things for which an action to remove a defendant can be prosecuted under the provisions of said section, to wit: (1) The charging and collecting of illegal fees for services ren-

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dered or to be rendered in his office; (2) refusing or neglecting to perform official duties pertaining to his office. And the penalty prescribed is deprivation of office and judgment of \$500 in favor of the informer, and costs.

It was held by this court in *Corker v. Pence*, 12 Ida. 152, 85 Pac. 388, under the provisions of said section, that no proceedings can be maintained against an officer for any other kind of misconduct in office than the two kinds mentioned in said section.

The defendant is charged with selling to the village of Hope certain merchandise and receiving pay therefor from the village, and it is contended that this is receiving and collecting illegal fees. The word "fees," as used in said act, means a charge for services. "Fee," as defined by Webster, is a reward for services performed or to be performed, especially for personal services. The term "fees" is used to designate the sums prescribed by law as charges for services rendered by public officers. (3 Words & Phrases, p. 2713.) The language of said section is, "has been guilty of charging and collecting illegal fees for services rendered or to be rendered in his office." The "fees" referred to in said section are for services rendered or to be rendered, and not for merchandise sold to the municipality of which the person charged was an officer. Clearly, the illegal selling of property to a municipality is not the "collection of an illegal fee" as contemplated by the provisions of said section.

In *Robinson v. Huffaker*, 23 Ida. 173, 129 Pac. 334, this court held that certain contracts entered into by a county commissioner with his county were void under the statute. The evidence in that case discloses conduct on the part of the defendant strictly within the provisions of sec. 7459, and in addition thereto the sale of a book-press to the county, and the court evidently inadvertently fell into an error by holding that the sale of said book-press was the collection of an illegal fee. The court there cites sec. 255, Rev. Codes, which prohibits members of the legislature, state, county, city, district and precinct officers from being interested in any contract made by them in their official capacity, or by any body

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or board of which they are members, with their municipality, and holds that the contract for the purchase of the book-press came within the provisions of the statute, it being the property of the defendant and he being a county commissioner. The court also cites secs. 1946 and 1956, Rev. Codes, which prohibit county officers from presenting any claim, except for services, against the county, and holds that the purchase of, and the payment for, said book-press was prohibited under the provisions of said sections. While the sale of said book-press was in violation of the statute, it clearly was not the "collection of an illegal fee for services rendered or to be rendered" by such officer.

In *Law v. Smith*, 34 Utah, 394, 98 Pac. 300, the supreme court of Utah had under consideration the claim of a sheriff, consisting of charges for railway fare and hotel expenses in taking convicts to the penitentiary, and said:

"Appellant further contends that, if respondent was not guilty under this section, he was guilty under section 4580, which, in substance, provides that when 'any officer . . . has been guilty of knowingly, wilfully and corruptly charging and collecting illegal fees for services rendered or to be rendered in his office,' and that this constitutes a cause for removal from office. It seems to us that the proof as above outlined does not bring respondent's case within the provisions of sec. 4580. The items of expense set out in the charge cannot be construed as a charge for illegal fees for services rendered. The respondent made no claim for any services, but the claim was one for money paid out and expended by him in the discharge of an official duty, for which the law provided neither fees nor compensation other than the salary provided for him by sec. 2057, Comp. Laws 1907, and he did not attempt to make a charge for services by presenting the claim either against the state or Cache county." (See, also, as touching upon this question, *Skeen v. Paine*, 32 Utah, 295, 90 Pac. 440; *Crossman v. Leshner*, 97 Cal. 382, 32 Pac. 449.)

So in the case at bar, the claims of defendant presented against the village were not for fees for services, but for merchandise sold to the village.

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We therefore hold that the sale of merchandise by a municipal officer to his municipality is not the "collection of illegal fees for services rendered or to be rendered by such officer."

It is next contended that the defendant has refused or neglected to perform the official duties pertaining to his office, in that he allowed said claims against his municipality and collected the same. The question presented is, do the acts there charged show that he has refused or neglected to perform any official duty pertaining to his office? He is there charged with doing certain acts, not with a refusal or neglect to perform some official duty pertaining to his office.

It was held in *People v. Burnside*, 3 Lans. (N. Y.) 74, that where a statute provided for the removal of certain officers in the event they should refuse or wilfully neglect to perform the duties of their office, the words should be construed to mean nonfeasance only, and it was held that an order removing them for misfeasance based on this provision of the act was improper, and the court said:

"The wilful neglect and refusal upon which the order was based was, that the commissioners had done an act in violation of their duty, and had been guilty of *misfeasance* in office, and was not upon the ground of a refusal to perform, or a wilful *nonfeasance*. . . . In order to make out a case within the provisions of the section cited, there must be an absolute refusal or a wilful neglect to perform some duty imposed by the act. The statute evidently was not intended to punish the commissioners for positive acts done by them in violation of law, but for contumacy, in refusing to obey the mandate of the law, and for wilfully and unlawfully neglecting to do what was required by the plain terms and import of the statute."

It is not charged in the information, in the case at bar, that the defendant failed or neglected to perform an official duty, but it is charged that he did act and allow illegal claims, hence the charge does not come within the purview of said section, since it must be charged that the officer neglected or refused to perform certain of his official duties, naming them.

It was held by this court in *Corker v. Pence*, 12 Ida. 152,

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85 Pac. 388, that proceedings for the removal of officers for all other wilful or corrupt misconduct, aside from the two mentioned in said sec. 7459, are provided for by sec. 7445 et seq., Rev. Codes; that the provisions of said sections of the statute were intended to meet all classes of misconduct except the two mentioned in said sec. 7459. The village in this case has its remedy against its officers who violated the law in making contracts with it.

We therefore conclude that the selling of merchandise by a municipal officer to his municipality and collecting pay therefor by allowing such claims against the city, and having warrants issued in payment of such claims, is not such misconduct as comes within the provisions of said sec. 7459, and that the judgment of the district court must be affirmed.

As this is decisive of this appeal, it will not be necessary for us to determine any other questions presented on this appeal.

Costs awarded to respondent.

Budge and Morgan, JJ., concur.

(May 22, 1915.)

RALPH A. COLLMAN, Appellant, v. A. W. GORDON,
Member of the Board of Trustees and Treasurer of the
Village of Hope, Idaho, Respondent.

[149 Pac. 294.]

This is a companion case to that of *Collman v. Wanamaker*, ante, p. 342, 149 Pac. 292, decided at this term of court, and on the authority of that case, the judgment is affirmed.

APPEAL from the District Court of the Eighth Judicial District, in and for Bonner County. Hon. John M. Flynn, Judge.

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Proceedings under sec. 7459, Rev. Codes, for the removal of the defendant as a member of the board of trustees of the village of Hope. Judgment for defendant. *Affirmed*.

G. H. Martin, Peter Johnson and Orley C. Granger, for Appellant.

H. H. Taylor and E. W. Wheelan, for Respondent.

Counsel cite same authorities as in *Collman v. Wanamaker*, ante, p. 342.

SULLIVAN, C. J.—This proceeding was instituted under the provisions of sec. 7459, Rev. Codes, asking the removal of the defendant, Gordon, as a member of the board of trustees of the village of Hope, charging him with the collection of illegal fees, set forth in nine causes of action, all of which involve the sale by the defendant to the village of Hope of certain merchandise, and it is charged that the sale of such merchandise and collecting the pay therefor was collecting illegal fees under the provisions of said section of the statute. In the tenth cause of action it is charged that the defendant, as treasurer of the village of Hope, neglected and refused to perform his official duties by not voting against the allowance of the claims to himself and by receiving payment of the warrants drawn therefor.

To this information a demurrer was filed on substantially the same grounds as the demurrer to the information in the case of *Collman v. Wanamaker*, decided in this court at its May, 1915, term, and reported, ante, p. 342, 149 Pac. 292.

The trial court sustained the demurrer to the information on all the grounds mentioned therein except the ground of uncertainty, and the plaintiff having elected not to amend his information, the court entered a judgment of dismissal. The appeal is from that judgment.

The same questions are involved in this case that were involved in the case of *Collman v. Wanamaker*, supra, and it was submitted upon the same argument and briefs and was to follow the decision in that case.

Points Decided.

Upon the authority of that case the judgment in the case at bar is affirmed, and costs of appeal awarded to the respondent.

Budge and Morgan, JJ., concur.

(May 24, 1915.)

LEWIS SANDERS, Appellant, v. CITY OF COEUR D'ALENE and FRED E. WANNACOTT, *Ex-officio* Tax Collector, Respondents.

[149 Pac. 290.]

AMENDMENTS—STATUTES—EXTENSION CITY LIMITS—LANDS CONTIGUOUS TO—VALID ORDINANCE.

1. Sec. 9 of the act of Feb. 9, 1899 (Sess. Laws. 1899, p. 109), was not amended or repealed, either directly or by implication, by the act of March 8, 1905 (Sess. Laws 1905, p. 391), prescribing the method for annexing adjacent territory to cities, towns or villages.

2. *Held*, that under the facts of this case, where it appears that the right of way of the Inland Empire Railway Company, 200 feet in width, intervened between the city of Coeur d'Alene and the Taylor Park Addition to Coeur d'Alene, the territory sought to be annexed, at the time the annexation ordinance was passed on July 26, 1907, said territory came properly within the purview of contiguous or adjacent territory under the provisions of said sec. 9 of the act of 1899, and was at that time legally annexed to the city of Coeur d'Alene. (*Hatch v. Consumers' Co., Ltd.*, 17 Ida. 204, 218, 104 Pac. 670, 40 L. R. A., N. S., 263, cited and followed.)

APPEAL from the District Court of the Eighth Judicial District for Kootenai County. Hon. Robert N. Dunn, Judge.

Action to perpetually enjoin collection of tax on property in an annexed district. Judgment for respondent. *Affirmed*.

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Argument for Respondents.

E. N. La Veine and W. F. Morrison, Jr., for Appellant.

Noncontiguous territory cannot be annexed. (28 Cyc. 193, 194; *Truax v. Pool*, 46 Iowa, 256.)

This question was set at rest by the leading case of *Forsythe v. Hammond*, 142 Ind. 505, 40 N. E. 267, 41 N. E. 950, 30 L. R. A. 576. In the latter case the right of way of the Chi. Calumet etc. Co. separated a strip of land sought to be annexed by the city of East Chicago. The proceedings were regular and in all other respects valid, but the court held that that one feature defeated the validity of the proceedings. (*Indianapolis v. McAvoy*, 86 Ind. 587; *Strosser v. Fort Wayne*, 100 Ind. 443; *Indianapolis v. Patterson*, 112 Ind. 344, 14 N. E. 551.)

Where a later act covers the whole subject matter of earlier acts and embraces new provisions, and it plainly appears that it was intended not only as a substitute for the earlier acts, but to cover the whole subject then considered by the legislature, and to prescribe the only rules in respect thereto, it operates as a repeal of all former statutes relating to the same subject matter, even if the former acts are not in all respects repugnant to the new act. (36 Cyc. 178, 1080; *People v. Lytle*, 1 Ida. 143; *Dillon v. Bicknell*, 116 Cal. 111, 47 Pac. 937; *Treadwell v. Yolo Co.*, 62 Cal. 563; *Charnock v. Rose*, 70 Cal. 189, 11 Pac. 625; *Hanley v. Sixteen Horses*, 97 Cal. 182, 32 Pac. 10; *Ex parte Benjamin*, 65 Cal. 310, 4 Pac. 23; *Baer v. Choir*, 7 Wash. 631, 32 Pac. 776, 36 Pac. 286; *Journal Pub. Co. v. Whitney*, 97 Cal. 283, 32 Pac. 237; *Mendocino Co. v. Mendocino Bank*, 86 Cal. 255, 24 Pac. 1002; *State v. Carbon Hill Coal Co.*, 4 Wash. 422, 30 Pac. 728; *McDermott v. Nassau Elect. R. Co.*, 85 Hun. 422, 32 N. Y. Supp. 884.)

McNaughton & Berg, for Respondents.

That part of the act of 1899 relative to extending the corporate limits was construed by this court in the case of *Hatch v. Consumers' Company*, reported in 17 Ida. 204, 104 Pac. 670, 40 L. R. A., N. S., 263, which involved the annexation of

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Krotzer's addition to the city of Coeur d'Alene, which addition was annexed in 1904.

The Minnesota court has given a very able discussion of the words "contiguous" or "adjacent" where used in the same relation as in this case, but unaided by any statutory enactments. (*State v. Village of Minnetonka*, 57 Minn. 526, 59 N. W. 972, 25 L. R. A. 755.)

BUDGE, J.—The appellant commenced this action in the district court of the eighth judicial district of Kootenai county, to perpetually enjoin the city of Coeur d'Alene, a municipal corporation, and Fred E. Wannacott, assessor and *ex-officio* tax collector of Kootenai county, respondents, from enforcing the collection of a special city tax levied against the property of the appellant, which, with the penalty and costs, amounts in all to \$16.96. The facts in this case were stipulated and submitted to the court, a jury being expressly waived. Judgment was entered in favor of respondent. This is an appeal from the judgment.

As the facts stipulated are somewhat voluminous, we do not think it is necessary to set them out *in haec verba*. They recite that the plaintiff is a citizen of the United States; the defendant is a municipal corporation, and Fred E. Wannacott was, at the times mentioned in plaintiff's complaint, the assessor and *ex-officio* tax collector of Kootenai county.

That in the year 1903 the Coeur d'Alene & Spokane Railway acquired from the federal government, through Fort Sherman reservation, a right of way to the extent of 200 feet in width, and in addition thereto twenty acres of the public domain for terminal grounds and station purposes; and since acquiring this property, said railway company and its successor, the Spokane & Inland Empire Railway Company, have continuously used the same for the maintenance and operation of their terminals, railway tracks and trains, carrying passengers from Spokane, Washington, and Coeur d'Alene, Idaho, to intermediate points.

That prior to 1903, the defendant, a municipal corporation, known as the village of Coeur d'Alene, was situated wholly on the east side of said railway right of way.

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That in 1905, the United States government caused said Fort Sherman Military Reservation to be subdivided into lots, tracts and parcels, which were sold at public auction, except the terminal grounds and right of way of said railway company.

That there is and has been a road, known as the Mullen Road, extending across said railway right of way and terminal grounds, connecting with First street in Coeur d'Alene on the east side and the city park on the west side of the railway grounds, which is being used as a highway to connect the two portions of the city.

That on the 26th day of July, 1907, defendant duly passed, approved, published and recorded ordinance No. 215, which is the ordinance in question in this action, for the purpose of extending the boundaries of the city of Coeur d'Alene by annexing thereto certain property lying *west* of the right of way and grounds of said railway company, including the property of the appellant herein.

That on the 26th day of July, 1907, when the ordinance in question was passed, the city of Coeur d'Alene extended to the easterly line of the railway right of way and station grounds, and that said right of way and station grounds stood between the city of Coeur d'Alene as it then existed and the property contiguous or adjacent to the property in dispute.

That the owners of the tracts and parcels of land on the west side of said railway right of way, caused a survey to be made of lot 15 and the south half of lots 16 and 17, Sec. 14, Twp. 50 N., Range 4 West, B. M., in said Fort Sherman Military Reservation, and had a plat prepared and filed. And also dedicated streets and alleys within said subdivisions. This tract was thereafter known, and is now known, as Taylor's Park Addition to the city of Coeur d'Alene, in which appellant's lot is situated. .

The city of Coeur d'Alene, for the year 1911, caused a special city tax to be levied upon and against the property of the appellant, which was certified to the county assessor of Kootenai county for collection, and which, with penalty to

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date of filing the complaint, amounted to \$5.75. This tax appellant has refused to pay.

It is further stipulated that the city of Coeur d'Alene, since the passage of ordinance No. 215, has levied and collected taxes on all property which said ordinance annexed to the city and has incurred bonded indebtedness for improvements, a considerable portion of which was for costs and expenses of constructing crossings, drains, cross-walks and curbs in said Taylor Park Addition.

That said territory included in said ordinance and lying west of said right of way has been represented in the city council of said city by one or more councilmen each year since said ordinance was passed.

Counsel for appellant makes five assignments of error. There is, however, but one question involved in this case, which is properly assigned under counsel's third assignment of error, viz., "The court erred in making and entering its decree in favor of respondent and against appellant, decreeing that lot 22, of block 2, Taylor's Park [addition to the city of Coeur d'Alene], Kootenai county, Idaho, is a part of the city of Coeur d'Alene and has been a part of the city of Coeur d'Alene since the 26th day of July, 1907; that it is subject to municipal taxes and all municipal taxes legally levied against it for the year 1911."

As appears from the statement of facts, during the month of July, 1907, the city of Coeur d'Alene enacted ordinance No. 215, whereby it annexed to the city of Coeur d'Alene all the tracts and parcels of land including the property of the appellant, lying west of the right of way and terminal grounds of said railway company.

It is contended by counsel for appellant that appellant's property lying west of the right of way and terminal grounds of the Spokane & Inland Empire Railway Company is not adjacent or contiguous to the property included within the city limits of the city of Coeur d'Alene to the eastward of said railway right of way and, therefore, is not subject to annexation to said city under the statutes of this state; that the fee in said terminal grounds and right of way is in the United

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States government and is not subject to be subdivided, platted and disposed of; and that the action of the city of Coeur d'Alene in attempting to annex the property of the plaintiff, together with other property lying west of the right of way of said railway company by ordinance No. 215 of July 26th, 1907, was void.

It therefore becomes necessary for us to advert to the statutes in force at the time of the passage and approval of said ordinance, in order to determine its validity.

It is urged by counsel for appellant that the Session Laws of 1905, at page 391, which amend in part the Session Laws of 1899, pages 106 to 110, by implication also amend section 9 of the Session Laws of 1899, page 109. Upon examination, we find that sec. 9 of the Sess. Laws of 1899, p. 109, which provides: "When land or territory shall be, or shall have been, laid off, subdivided or platted into lots or blocks, and such lots or blocks shall be, or shall have been, for the purpose of sale or otherwise subdivided into small lots or parcels, such smaller lots or parcels shall be treated or regarded as lots or blocks within the meaning of the two preceding sections; and land or territory laid off or subdivided, as in said sections described, shall be regarded and treated as contiguous to such city or town, *notwithstanding any stream or embankment or any strip or parcel of land not more than two hundred feet in width may be or lie between such land or territory and the corporate limits of such city or town,*" was not amended or repealed by the Session Laws of 1905, page 391, or 1907, page 309; nor was said section 9 of the 1899 Session Laws referred to or amended, expressly or by implication, in any of the subsequent Session Laws. Neither was it compiled and made a part of the codes by the code commissioner in 1909. There are no subsequent statutory enactments that contain any provisions which in any way conflict with, or are repugnant to, said section 9. Later enactments amending Session Laws of 1899, pages 108 and 109, empowered municipalities to annex tracts containing less acreage than formerly provided and made other minor changes; but the provisions of the law affecting contiguous and adjacent lands, as provided in sec.

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9, Sess. Laws 1899, as above mentioned, were not changed in any manner.

We do not deem it necessary, at this time, to determine whether the adoption by the legislature of the codes of 1909 repealed section 9 of the Session Laws of 1899, page 109. Suffice it to say, that at the date of the enactment of ordinance No. 215 by the city council of Coeur d'Alene (July 26th, 1907), said section 9 was in full force and effect and said ordinance must be deemed to have been passed and adopted in pursuance of said section. In our opinion, the case of *Hatch v. Consumers' Co., Ltd.*, 17 Ida. 204, 218, 104 Pac. 670, 40 L. R. A., N. S., 263, is decisive of this case.

It is conceded in the stipulation of facts that the right of way dividing the main portion of the city of Coeur d'Alene from the west portion or subdivision thereof is 200 feet in width. The contention of appellant, therefore, is answered by the provisions of sec. 9 of the Sess. Laws 1899, p. 109, heretofore quoted.

It is therefore ordered that the judgment of the trial court be affirmed, with costs awarded to respondent.

Sullivan, C. J., and Morgan, J., concur.

Argument for Appellant.

(May 24, 1915.)

J. G. FRALICK, Respondent, v. R. H. MERCER, Appellant.

[148 Pac. 906.]

CONTRACT—DAMAGES—PLEADINGS—AMENDMENTS—MOTION TO STRIKE—INSTRUCTIONS.

1. Where an action is brought on a written contract and as a defense the defendant pleads a contemporaneous oral agreement to the effect that it released him from a performance of the written contract, the court did not err in striking out such defense on motion.

2. The general rule is that a plea or answer setting up a parol contemporaneous agreement inconsistent with the contract sued on is bad on demurrer or may be stricken out on motion.

3. *Held*, that the court did not abuse its discretion in denying defendant's motion to amend his answer.

4. *Held*, that the court did not err in giving certain instructions and that the instructions given by the court correctly stated the rule for the measure of damages applicable in this case.

APPEAL from the District Court of the Eighth Judicial District for Kootenai County. Hon. Robert N. Dunn, Judge.

Action to recover damages for breach of contract. Judgment for plaintiff. *Affirmed*.

McFarland & McFarland, for Appellant.

Appellant had refused to sign the contract, and would not have signed it had not respondent agreed that he would not hold him to a strict fulfillment thereof, and promised that no action for damages would be brought for the nonfulfillment of the contract. Said promises of respondent were the consideration for appellant's executing the contract, and are not in the nature of an oral agreement tending to vary or change the terms or conditions of a written agreement. (17 Cyc. 638 et seq.)

"Parol evidence is admissible to show that an instrument was never intended by the parties to become operative as a valid binding obligation." (9 Ency. Evidence, 335.)

Argument for Respondent.

This oral agreement does not in any sense conflict with the contract, nor does it vary, contradict or change the terms of the contract, because nothing is mentioned in said contract in regard to damages. There may be an independent oral agreement as to matters on which the written contract is silent, and which is not inconsistent with its terms. (9 Ency. Evidence, 350 D.)

Parol evidence is admissible to show the rescission of a contract in writing by a subsequent parol agreement between the parties thereto. (9 Ency. Evidence, (5) 359; 9 Cyc. 597, 598.)

This court has more than once held that great liberality must be exercised in the allowance of amendments to pleadings. (*Kroetch v. Empire Mill. Co.*, 9 Ida. 277, 74 Pac. 868; *Dunbar v. Griffiths*, 14 Ida. 120, 93 Pac. 654.)

Ezra R. Whitla, for Respondent.

The written contract provides explicitly for the delivery of 50,000 ties; the defendant sets up a contemporaneous parol agreement that he did not have to deliver this number of ties. The parol contract is not only inconsistent with the written contract, but absolutely abrogates it.

"A plea or answer setting up a parol contemporaneous agreement inconsistent with the written contract in suit is bad on demurrer." (9 Cyc. 733; *Fitzgerald v. Burke*, 14 Colo. 559, 23 Pac. 993; *Fort Scott Coal & Min. Co. v. Sweeney*, 15 Kan. 244; *Thisler v. Mackey*, 65 Kan. 464, 70 Pac. 334; *Jacobs v. Shenon*, 3 Ida. 274, 29 Pac. 44.)

This is the universal rule and is sustained by all the authorities. (*Merrill v. Young*, 5 Kan. App. 761, 47 Pac. 187; *Daly v. Kimball Co.*, 67 Iowa, 132, 24 N. W. 756; *Kinnard Co. v. Cutter Tower Co.*, 159 Mass. 391, 34 N. E. 460; *Davis v. Robinson*, 71 Iowa, 618, 33 N. W. 132; *Engelhorn v. Reitlinger*, 122 N. Y. 76, 25 N. E. 297, 9 L. R. A. 548; *Wheaton Roller Mills Co. v. John T. Noye Mfg. Co.*, 66 Minn. 156, 68 N. W. 854; *Ryan v. Cooke*, 172 Ill. 302, 50 N. E. 213; *Lilien-thal v. Suffolk Brewing Co.*, 154 Mass. 185, 26 Am. St. 234, 28 N. E. 151, 12 L. R. A. 821.)

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The question of permission to amend a pleading, especially during the trial of a case, is always entirely within the discretion of the trial judge, and unless it appears clearly that that discretion has been abused, his ruling thereon will not be reviewed or interfered with. (31 Cyc. 368; *Anthony v. Slayden*, 27 Colo. 144, 60 Pac. 826; *Lowe v. Long*, 5 Ida. 122; 47 Pac. 93; *Small v. Harrington*, 10 Ida. 499, 79 Pac. 461.)

Defendant's proposed amendment came too late to allow him to interpose the same, as to be allowed or permitted to amend at this time would certainly have been a case of great injustice against the plaintiff. (*Garrison v. Goodale*, 23 Or. 307, 31 Pac. 709.)

Where an amendment is sought after the trial is commenced the party asking to amend should make a good and sufficient showing as to why the amendment was not made sooner, and in the absence of such showing the disallowance of the amendment is no ground for complaint. (*Phenix Ins. Co. v. Stocks*, 149 Ill. 319, 36 N. E. 408; *Phenix Ins. Co. v. Caldwell*, 187 Ill. 73, 58 N. E. 314; *Loverin-Browne Co. v. Bank of Buffalo*, 7 N. D. 569, 75 N. W. 923; *Dublin v. Taylor B. & H. E. Co.*, 92 Tex. 535, 50 S. W. 120.)

SULLIVAN, C. J.—This action was brought to recover from the defendant, who is appellant here, the sum of \$1174.06 damages for an alleged breach of a written contract to furnish a certain number of railroad ties. The written contract declared on was attached as an exhibit to the amended complaint and made a part thereof.

By the answer the defendant virtually admitted that he entered into a contract with the respondent to furnish him a certain number of railroad ties at certain prices, and admitted that he signed the contract set forth as an exhibit to the complaint, and avers that said contract was presented to him by the respondent and he (the appellant) kept it in his possession without signature for about three weeks, when the respondent inquired of him what he had done with it and why he had not signed and returned it to him, and appellant replied that he had not signed the contract and did not intend

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to do so, because he could not furnish the ties therein mentioned at the prices therein stated; that thereupon respondent stated to appellant that he need not furnish all of the ties mentioned in said contract, but that it would be satisfactory if he would furnish as many as he was able to and could furnish, and requested appellant to sign said contract, and thereupon appellant stated to respondent that he would sign the contract and furnish all of the ties he could for the prices mentioned in the contract, but would not furnish all of them, provided there would be no damage suit brought by respondent against appellant for failure to furnish all of the ties mentioned in said contract. Thereupon respondent promised and agreed that there would be no damage suit brought by him against appellant by reason of his failure to furnish all of the ties called for by said contract, and that appellant could furnish just such number of ties as he saw fit under said contract. Thereupon appellant signed said contract as of the date it was prepared and thereafter delivered to respondent a part of the 50,000 ties called for by said contract.

On motion of respondent this affirmative defense was stricken out. The case was thereafter tried to a jury and during the trial counsel for appellant stated to the court that he desired to submit an amendment to his answer. Thereupon the court advised appellant's counsel to prepare the amendment at the noon hour and submit it in writing. Upon the convening of court, after the expiration of the noon hour, appellant presented to the court an amendment to his answer, and asked that the same be substituted in lieu of paragraph 1 of said answer, which had been stricken out. The proposed amendment to the answer, in addition to incorporating therein the written contract referred to in the answer and all of the affirmative matters theretofore stricken out by the court on motion of counsel for plaintiff, contained the further allegation that after the verbal agreement had been entered into between the respondent and appellant concerning the signing of the contract, and after appellant had proceeded to furnish some of the ties to respondent, appellant and respondent agreed that appellant should not furnish any

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other or further ties under said agreement than those already furnished. The court thereupon refused to allow said amendment.

The case was thereafter tried to a jury and a verdict was entered in favor of the plaintiff for the sum of \$1,123.78, and judgment was entered for that amount. This appeal is from the judgment.

Several errors are assigned which refer to the action of the court in sustaining respondent's motion to strike out appellant's affirmative answer and defense, and in refusing to allow appellant to amend his answer, and in giving and refusing to give certain instructions.

The first question presented is as to the action of the court in striking out defendant's affirmative defense. In that affirmative defense was set up a contemporaneous oral agreement made prior to the signing of said contract, whereby it was agreed that the defendant need not comply with his part of said contract.

The well-established general rule is that a plea or answer setting up a parol contemporaneous agreement inconsistent with the written contract sued on is bad on demurrer, or may be stricken out on motion. (See 9 Cyc. 733, and authorities there cited; *Fitzgerald v. Burke*, 14 Colo. 559, 23 Pac. 993; *Thisler v. Mackey*, 65 Kan. 464, 70 Pac. 334; *Jacobs v. Shenon*, 3 Ida. 274, 29 Pac. 44; *Tyson v. Neill*, 8 Ida. 603, 70 Pac. 790; *Newmyer v. Roush*, 21 Ida. 106, Ann. Cas. 1913D, 443, 120 Pac. 464.)

In *Burke v. Dulaney*, 153 U. S. 228, 14 Sup. Ct. 816, 38 L. ed. 698, the supreme court of the United States held that a written contract cannot be contradicted or varied by evidence of an oral agreement between the parties before or at the time of such contract. In that case it appears that the promissory note sued on had never been delivered as a present contract, and in a case of that kind parol evidence may be introduced to show that the delivery of the contract was only conditional and not delivered as a present contract. In the case at bar the contract was delivered and a number of thousand ties delivered under it in accordance with its terms.

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Here the defendant by said affirmative defense alleged that he entered into an oral agreement with the plaintiff that he need not comply with the provisions of said contract in case he would sign it, and the court was clearly right in striking out any such an attempted affirmative defense, under the rule above stated.

It is next contended that the court erred in refusing to allow the appellant to amend his answer during the trial. The court was in the midst of the trial at the time the request to amend the answer was made. The court thereupon permitted the attorney to prepare his amendment, and upon presentation of it, it was ascertained that said amendment contained in part as a defense the identical contemporaneous oral agreement that had theretofore been stricken out, and as a further defense was averred an alleged oral release from the contract sued on, that said release was voluntary, etc.

The oral contemporaneous agreement above referred to, which was first alleged as a defense, was clearly inconsistent with the defense sought to be plead by the amendment, since the amendment plead an oral agreement releasing the defendant from the conditions of said contract. In the amendment it is averred that on or about the 1st of June, 1913, plaintiff, at the village of St. Maries, informed and notified the defendant that he need not deliver any more or other ties under said contract, and that defendant thereupon informed plaintiff that it was agreeable for him not to furnish any more or other ties under said contract, and it was there agreed that he need not furnish any more ties under said contract.

If the defendant had been released entirely from the provisions of said contract by a subsequent oral agreement made on or about the 1st of June, 1913, it was certainly remarkable that he did not plead that in his own original answer as a defense, instead of pleading the contemporaneous oral agreement that he did plead as a defense.

We think the court did not abuse its discretion in denying appellant's motion to amend, for such an amendment would change the whole theory of the defense.

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This court held in *Small v. Harrington*, 10 Ida. 499, 79 Pac. 461, that an amendment to pleadings at any stage of the proceedings was largely within the sound discretion of the trial court, and in *Lowe v. Long*, 5 Ida. 122, 47 Pac. 93, that where, during the progress of a trial, defendant asks leave to amend his answer, and it is apparent that such amendment will entirely or materially change the issue, such leave is a matter of discretion with the trial court. By uniform decisions of this court, where the discretion of the trial court is involved, the exercise of that discretion will not be disturbed unless there be a clear abuse of such discretion.

Under all of the facts of this case, the trial court did not abuse its discretion in denying the defendant the right to amend. As touching upon this question, see *Garrison v. Goodale*, 23 Or. 307, 31 Pac. 709.

Where an amendment to an answer is sought after the trial has commenced, the party asking to amend should make a good and sufficient showing as to why the amendment was not made sooner, and in the absence of such showing, the disallowance of such amendment is not a ground for complaint. (See *Phenix Ins. Co. v. Stocks*, 149 Ill. 319, 36 N. E. 408; *Phenix Ins. Co. v. Caldwell*, 187 Ill. 73, 58 N. E. 314.)

Some objection is raised as to the correctness of the instructions given by the court, and it is contended that the court erred in advising the jury that it was admitted that the "plaintiff and defendant entered into a contract for the sale by defendant to plaintiff of 50,000 ties," and it is contended that this statement is not true. It is true that the defendant plead *in haec verba* said contract for the sale of 50,000 ties and then undertook to plead contemporaneous oral agreements to change said contract, and the court did not err in giving the instruction referred to.

It is contended that the rule laid down by the court in the instructions given for the measure of damages applicable to this case is not correct. We cannot agree with counsel in that contention. Upon an examination we find that the instructions state correctly the rule of damages applicable to this case.

Argument for Appellant.

Finding no reversible error in the record, the judgment must be affirmed, and it is so ordered, with costs in favor of the respondent.

Budge and Morgan, JJ., concur.

(May 25, 1915.)

WILLIAM NUESTEL, Respondent, v. SPOKANE INTERNATIONAL RAILWAY CO., a Corporation, Appellant.

[149 Pac. 462.]

DEFAULT—JUDGES—POWER OF AT CHAMBERS—TESTIMONY—JUDGMENT—ENTRY OF—NOTICE OF TO DEFENDANT—DISCRETION OF JUDGE.

1. Where a default has been entered in a case where unliquidated damages are claimed, under the provisions of subd. 17 of sec. 3890, Rev. Codes, the judge has power and jurisdiction to hear testimony and to enter judgment at chambers, and the judgment so entered has the same force and effect as though entered in open court.

2. Where default has been entered, it is not necessary to give the defendant in default notice that the judge is going to proceed and hear testimony at chambers and enter judgment.

3. An application to set aside a default is addressed to the sound, legal discretion of the trial court, and unless it is made to appear that such discretion has been abused, the order made on such application will not be disturbed upon appeal.

APPEAL from the District Court of the Eighth Judicial District for Kootenai County. Hon. Robert N. Dunn, Judge.

Action to recover damages for the killing of certain animals by the defendant railway company. Judgment for plaintiff. *Affirmed.*

E. R. Whitla and Allen & Allen, for Appellant.

All of the proceedings upon which the application to set aside the default and judgment were taken appear in the

Argument for Appellant.

record. The court heard the case upon affidavits and no oral testimony was introduced; so that this court will hear and determine this question now the same as if the matter had been presented to it in the first instance and will review the court's decision and exercise its own discretion in the matter the same as the trial court is authorized to do in such cases. (*Van Camp v. Emery*, 13 Ida. 202, 89 Pac. 752; *Council Improvement Co. v. Draper*, 16 Ida. 541, 102 Pac. 7.)

By sec. 4360, Rev. Codes, subd. 2, it is contemplated that such cases will remain upon the calendar after the entry of default and be set for hearing at the next term, but in this case the judgment was entered *ex parte* at chambers without notice to any person whatever. This section of the statute provides for the court hearing cases and entering judgments and not for the judge to do so at chambers. Upon this proposition, we think, the plaintiff could only have the court to enter judgment at a time when the defendant would be present and allow an opportunity to contest the amount of damages. (*Parke v. Wardner*, 2 Ida. 263, 285, 287, 13 Pac. 172; *Ruth v. Smith*, 29 Colo. 154, 68 Pac. 278; 2 Sutherland on Damages, 3d ed., sec. 429; 6 Ency. Pl. & Pr. 132; *Ballard v. Purcell*, 1 Nev. 342, 343.)

Even though in default the defendant has a right to question the amount of damages, to cross-examine the witness and to object to incompetent evidence being introduced. (6 Ency. Pl. & Pr. 136-138, and notes; 2 Sutherland on Damages, 3d. ed., sec. 430.)

"After the defendant has appeared in an action he is entitled to notice of the assessment of damages which should always be given." (10 Ency. Pl. & Pr. 1140; *Searles v. Lawrence*, 8 S. D. 11, 65 N. W. 34.)

"The power of the court should be freely and liberally exercised under the statute, to mold and direct its proceedings, so as to dispose of cases upon their substantial merits." (*Hamilton v. Hamilton*, 21 Ida. 672, 123 Pac. 630; *O'Brien v. Leach*, 139 Cal. 220, 96 Am. St. 105, 72 Pac. 1004.)

Argument for Respondent.

C. H. Potts and Bert A. Reed, for Respondent.

Defendant failed to plead to the amended complaint within the time allowed by law, and upon such failure, judgment by default could be entered, as in other cases. This brought the case within the provisions of sec. 4360, Rev. Codes, the same as though no appearance had ever been made by the defendant. (*Hall v. Whittier*, 20 Ida. 120-125, 116 Pac. 1031.)

The defendant was not entitled to any notice of this application, and this was, therefore, not a ground on which to base a motion to vacate the judgment and set aside the default. (*Hall v. Whittier*, *supra*.)

"After default a defendant cannot be heard to contest the subsequent proceedings, and certainly it would be a useless thing to require notice of such proceedings to be served upon him." (*Norris v. Campbell*, 27 Wash. 654, 68 Pac. 339; *Hyde v. Heaton*, 43 Wash. 433, 86 Pac. 664; *General Litho. Co. v. American Trust Co.*, 55 Wash. 401, 104 Pac. 608.)

"An application to set aside and vacate a judgment is addressed to the sound legal discretion of the court, and unless it appears that such discretion has been abused, the order will not be disturbed upon appeal." (*Culver v. Mountain-home Electric Co.*, 17 Ida. 669, 107 Pac. 65; *Harr v. Knight*, 18 Ida. 53, 108 Pac. 539; *Vollmer Clearwater Co. v. Grunewald*, 21 Ida. 777, 124 Pac. 278; *Richards v. Richards*, 24 Ida. 87, 132 Pac. 576; *Baker v. Knott*, 3 Ida. (Hasb.) 700, 35 Pac. 172; *Holland Bank v. Lieuallen*, 6 Ida. 127, 53 Pac. 398; *Thum v. Pyke*, 6 Ida. 359, 55 Pac. 864; *Pease v. County of Kootenai*, 7 Ida. 731, 65 Pac. 432; *Holzeman v. Henneberry*, 11 Ida. 428, 83 Pac. 497; *Western Loan & Savings Co. v. Smith*, 12 Ida. 94, 85 Pac. 1084; *Vane v. Jones*, 13 Ida. 21, 88 Pac. 1058; *Pittock v. Buck*, 15 Ida. 47, 96 Pac. 212; *Council Imp. Co. v. Draper*, 16 Ida. 541, 102 Pac. 7; *Morbeck v. Bradford-Kennedy Co.*, 19 Ida. 83, 113 Pac. 89; *Humphreys v. Idaho Gold Mines Development Co.*, 21 Ida. 126, 120 Pac. 823, 40 L. R. A., N. S., 817; *Brooks v. Orchard Land Co., Ltd.*, 21 Ida. 212, 121 Pac. 101; *Hamilton v. Hamilton*, 21 Ida. 672, 123 Pac. 630.)

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Where a defendant suffers a default to be taken against it because of its failure to employ Idaho attorneys to look after its cases pending in the courts of Idaho, it should receive scant consideration. (*Manning v. Roanoke etc. R. Co.*, 122 N. C. 824, 28 S. E. 963; *Jett v. Herald*, 23 Ky. L. 9, 62 S. W. 264; *Union etc. Ins. Co. v. Lipscomb* (Tex. Civ.), 27 S. W. 307; *Benedict v. Hadlow Co.*, 52 Fla. 188, 42 So. 239; *Bank of Glade Springs v. Palmer*, 153 N. C. 501, 69 S. E. 507.)

SULLIVAN, C. J.—This action was brought to recover the alleged value of five cows and three calves, alleged to have been killed by the defendant railway company. The original complaint was filed in said action on the 24th day of October, 1913, and the defendant, who is appellant here, demurred to said complaint. Thereafter on December 30, 1913, and before the court had passed upon said demurrer, the plaintiff filed his amended complaint, which amended complaint was served upon the resident attorney for the railroad.

On the 31st of that month, the resident attorney's term of service with the railroad company expired, and on that day he transmitted a copy of the amended complaint to Messrs. Allen & Allen at Spokane, Washington, inclosing a letter therewith calling said attorneys' attention to said amended complaint and requesting that they attend to the matter as his contract of employment with the railroad company had terminated.

No demurrer or answer was filed to said amended complaint and on January 10, 1914, the time for said defendant to plead to said amended complaint having expired and no pleading having been served or filed, the plaintiff applied to the clerk of the district court for a default against the defendant and default was entered on that day. On the 12th of January, 1914, two days after default had been entered, the plaintiff appeared before the district court and offered evidence in support of the damage claimed by him, and the court heard the evidence and thereupon entered judgment in his favor for the amount prayed for in the complaint, with interest.

It appears that on the 12th of January, 1914, one of the Spokane attorneys wrote a letter to one of the attorneys for

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the plaintiff requesting an extension of time to February 1st in which to answer said amended complaint, and in response to that letter the attorney replied that a judgment had been entered in the case on the 12th of January, which, it seems, was the first intimation the attorneys for appellant had that a default had been entered in said case. It seems that the member of the firm of Allen & Allen who had attended to the railroad company's business had been quite ill for some time and the matter was overlooked.

Some time thereafter an application was made to set aside said default and a hearing noticed for February 7, 1914. The application was based upon affidavits and the records and files. Said motion was presented to the court and taken under advisement by him and thereafter the motion to set aside the default was denied. This appeal is taken from the order denying said motion.

The order denying the motion to set aside the default and judgment is based on two grounds: 1. That the answer does not set forth a meritorious defense; and 2. That the application to set aside said default was without any merit whatever.

Appellant assigns three errors. The first two relate to the proposition that the trial court could not render judgment at chambers without giving notice to the defendant, even though it was in default.

At the time the amended complaint was served and filed, the case was pending on a demurrer to the original complaint. There had been no trial of the issue of law raised by the demurrer, but under the provisions of sec. 4228, Rev. Codes, the plaintiff had a right to serve and file an amended complaint, and the defendant was required to answer or demur thereto within ten days after such service and filing. Under the provisions of sec. 4176, when an amended complaint is filed and the defendant fails to plead thereto within the time provided by statute, judgment may be entered by default the same as in other cases.

In this case the amended complaint was served on December 30, 1913, and the defendant had ten days thereafter to

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plead to said amended complaint. It failed to do so within the time allowed by law, and upon such failure judgment by default might be entered as in other cases.

But it is contended that the judge at chambers has no authority to hear testimony and enter judgment in default cases. There is nothing in that contention. Subd. 17 of sec. 3890, Rev. Codes, provides that a district judge has power to enter defaults and to hear testimony thereon and to enter judgment in default cases where there has been no appearance or pleading filed within the time prescribed by statute, and to give the judgment the same force and effect as though entered in open court.

This court held in *Washington County Land & Dev. Co. v. Weiser Nat. Bank*, 26 Ida. 717, 146 Pac. 116, that in case the defendant failed to appear, answer, demur or otherwise plead within the time prescribed by statute, the district judge has jurisdiction and power at chambers to enter a default and to hear testimony thereon and to enter judgment. Where a defendant is in default, it is not necessary to give him notice that the judge is going to proceed and hear testimony in the case at chambers and enter judgment.

After a careful examination of the affidavits, records and transcript in this case, we are satisfied that the court did not err in refusing to set aside said default. The application to set aside the default was addressed to the sound, legal discretion of the trial court, and unless it is made to appear that such discretion has been abused, the order made will not be disturbed upon appeal. (*Culver v. Mountainhome Electric Co.*, 17 Ida. 669, 107 Pac. 65; *Harr v. Kight*, 18 Ida. 53, 108 Pac. 539; *Vollmer Clearwater Co. v. Grunewald*, 21 Ida. 777, 124 Pac. 278.)

The order and judgment appealed from must be affirmed, and it is so ordered, with costs in favor of respondent.

Budge and Morgan, JJ., concur.

Argument for Appellant.

(May 28, 1915.)

JOHN HUBER, Respondent, v. BLACKWELL LUMBER COMPANY, Appellant.

[148 Pac. 903.]

LOGGING CONTRACTS—DUTY OF CONTRACTOR TO PROVIDE MEANS OF PERFORMANCE—DIVISIBLE CONTRACT—PARTIAL PERFORMANCE.

1. It is the duty of one who contracts to deliver logs, in the absence of a provision in the contract to the contrary, to provide all necessary means, including roads and rollways, to enable him to complete the delivery.

2. A party who has failed to perform his contract in full to deliver logs may recover compensation for the logs delivered according to the contract price, less damages occasioned by his failure to complete the contract.

APPEAL from the District Court of the Eighth Judicial District for Kootenai County. Hon. John M. Flynn, Judge.

Action on contract. Judgment for plaintiff. *Affirmed.*

John P. Gray and Frank McCarthy, for Appellant.

Under the terms of the contract, it was the duty of respondent to supply all means and appliances necessary to prosecute the work and to deliver the logs along camp 4 spur on or before Nov. 1, 1912, and the law will presume that the supplying of such appliances was a part of the contract price and covered thereby. (*Godkin v. Monahan*, 83 Fed. 116, 27 C. C. A. 410; *Gabrielson v. Hague Box & Lbr. Co.*, 55 Wash. 342, 133 Am. St. 1032, 104 Pac. 635.)

Under the form of action which the respondent brought, under his proof and under the issues he could not recover under *quantum meruit* for the work done by him, for where a contract is entire and one party not in default is willing to complete its performance, the other party who abandons the contract or refuses to perform cannot recover on the contract or on the *quantum meruit* the value of the labor he has expended in its partial performance. (*Naylor v. Adams*, 15 Cal.

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App. 548, 115 Pac. 335; *Johnson v. Fehsefeldt*, 106 Minn. 202, 118 N. W. 797, 20 L. R. A., N. S., 1069; *Galvin v. Prentice*, 45 N. Y. 162, 6 Am. Rep. 58; *Cohn v. Plumer*, 88 Wis. 622, 60 N. W. 1000; *Grand Forks Lbr. Co. v. McClure Logging Co.*, 103 Minn. 471, 115 N. W. 406; *Hetherington v. Firth*, 210 Mass. 8, 95 N. E. 961.)

The contract in this case does not come within the rule laid down even in those states most liberal in construing contracts severable so as to allow a recovery *pro tanto* for part performance, because:

1. Its essence is entirety. By its express terms full performance is a condition precedent to the deferred payments.

2. The acts of the lumber company in accepting and in paying in part for monthly deliveries of the logs could not be declared by the court a severance of the contract on its part, for in doing so it was complying with an express condition of the contract taken in its entirety, and was not a waiver by it of the condition precedent to deferred payments, to wit, full performance by the plaintiff.

By the terms of the contract plaintiff agreed to sell and deliver to defendant all the white pine timber then standing on his quarter section, and also at least one million feet of mixed logs on or before a fixed date. Therefore while the subject matter of the contract was capable of subdivision into lesser units, the above expressions of the contract are quite conclusive that such was not the intention of the parties. (*Shinn v. Bodine*, 60 Pa. St. 182, 100 Am. Dec. 560; 9 Cyc. 650; *Widman v. Gay*, 104 Wis. 277, 80 N. W. 450; *Mallory v. Mackaye*, 92 Fed. 749, 34 C. C. A. 653; *Easton v. Jones*, 193 Pa. St. 147, 44 Atl. 264; *Oldewurtel v. Bevan*, 117 Md. 645, 84 Atl. 66.)

McFarland & McFarland, for Respondent.

The policy of this court has been not to take a case from the jury if there is any evidence for the jury to consider. (*Adams v. Bunker Hill M. Co.*, 12 Ida. 651, 89 Pac. 624, 11 L. R. A., N. S., 844; *Calkins v. Blackwell Lbr. Co.*, 23 Ida. 128, 143, 129 Pac. 435.)

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"A part performance or a defective performance of a condition precedent is generally not sufficient, but after one party has performed the contract in a substantial part, and the other party has accepted and had the benefit of the part performance, the latter may thereby be precluded from relying upon the performance of the residue as a condition precedent to his liability. In such case he must perform the contract on his part and must rely upon his claim for damages in respect of the defective performance." (9 Cyc. 645.) The contract involved in this action is a severable contract. (*Gomer v. McPhee*, 2 Colo. App 287, 31 Pac. 119.)

This being a severable contract, Huber is not required to sue upon a *quantum meruit* for any breach of contract by appellant, but he has a right to rely upon any want or lack of performance by appellant. (*Presbyterian Church v. Hoopes A. S. C. & P. Co.*, 66 Md. 598, 8 Atl. 752; *Abbott v. Wyse*, 15 Conn. 254; *Andre v. Hardin*, 32 Mich. 324; *Todd v. Huntington*, 13 Or. 9, 4 Pac. 295; *Morrow v. Huntoon*, 25 Vt. 9; *Baltimore & O. R. Co. v. Lafferty*, 2 W. Va. 104; *Woodford v. Kelley*, 18 S. D. 615, 101 N. W. 1069; *Front St. M. & O. R. Co. v. Butler*, 50 Cal. 574; *Foeller v. Heintz*, 137 Wis. 169, 118 N. W. 543, 24 L. R. A., N. S., 327; *McDonough v. Evans Marble Co.*, 112 Fed. 634, 50 C. C. A. 403.)

MORGAN, J.—This appeal was heard at the December, 1914, term and an opinion was rendered. A petition for rehearing was granted, the case was reargued and again submitted for decision.

The action was brought to recover \$2,619.77 alleged to be the balance due from appellant to respondent for sawlogs sold and delivered by respondent to appellant under a written contract, which is, in part, as follows:

"(1) The party of the first part agrees to sell and deliver to the party of the second part all the merchantable white pine timber now standing on the above-described land; and at least one million (1,000,000) feet of red fir, tamarack, white fir and cedar logs from the lands of the party of the first part and to deliver the same to the party of the second part decked

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on camp 4 spur of the Coeur d'Alene & Southern railroad in section twenty-three (23), township forty-nine (49) north, range five (5) W., and to sell the same unto the party of the second part at and for the following prices, to wit:

White pine	\$8.50 per thousand feet
Red fir	4.50 per thousand feet
Tamarack	4.50 per thousand feet
Cedar	4.50 per thousand feet
White fir	4.50 per thousand feet

"And the party of the second part hereby agrees to buy and purchase the same at the prices above stated.

"(6) The party of the first part further agrees to complete this contract by cutting and decking and delivering along the said spur above mentioned all of the logs covered hereby on or before the 1st day of November, 1912.

"(7) It is further agreed by and between the parties that payment for said logs shall be made as follows:

"Four dollars (\$4) per thousand feet on the 15th day of each month for all logs scaled the previous month. The balance due the party of the first part to be paid ninety-one (91) days after the completion of this contract.

"(10) The party of the first part agrees to deck the said logs on the said camp 4 spur of the railroad track as above provided, in good and workmanlike manner."

It is alleged in the amended complaint and admitted in the amended answer that respondent delivered to appellant 524,110 feet of white pine logs and 522,550 feet of mixed logs, consisting of red fir, tamarack, cedar and white fir, and that the appellant has paid to the respondent upon the logs so delivered the sum of \$4.00 per thousand feet and no more. It is alleged by respondent and denied by appellant that there is now due and owing to respondent from appellant for said logs, in the aggregate, a balance of \$2,619.77.

The appellant alleged and relied upon two counterclaims based upon respondent's failure to deliver a certain portion of the logs mentioned in the contract, and asked for an affirmative judgment against respondent in the sum of \$3,435.23.

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It appears from the transcript that during the month of October, 1912, respondent abandoned his contract, and he assigns as his reason for so doing that appellant violated the contract by failing to remove the logs which had been delivered and by permitting the rollways to become so congested as to prevent him from completing the delivery.

Camp 4 spur is a branch of a logging railroad and is a little more than a mile long in said sec. 23. Upon said spur is located a logging camp known as camp 4, where the rollways are situated upon which the logs were delivered. Said camp and rollways are the property of appellant and respondent was permitted to use said property in his logging operations. It appears that from some time in July until some time in August the engine, with which cars on said spur were moved, was broken, and hauling was suspended, and that thereby the rollways at camp 4 became congested with logs.

There is conflict in the evidence as to whether or not additional decking ground along said spur in sec. 23 could have been procured by respondent with reasonable expense. It is contended by respondent that appellant breached the contract by its failure to keep the rollways clear, and appellant contends that respondent breached the contract by his failure to deliver the full amount of the logs and that abundant ground was available along said spur in sec. 23 for decking purposes, and that it was respondent's duty, under the contract, to construct additional rollways and roads, if necessary, in order to make the delivery. It is clear that it was the duty of respondent to provide all means necessary to fulfill his contract and, since nothing therein contained provides to the contrary, it was his duty, if suitable ground therefor could be found along the spur within said section, to construct additional rollways and roads to them, if necessary, in order to complete the delivery. (See *Godkin v. Monahan*, 83 Fed. 116, 27 C. C. A. 410.)

In view of the issues framed and the verdict of the jury it seems to us to be immaterial whether his failure to complete his contract was due to the fault of respondent or whether he was prevented from completing it by appellant, for this ap-

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pears to us to be a divisible contract under which respondent should be permitted to recover the price of the logs delivered less the amount of damage suffered by appellant by reason of respondent's failure to deliver those not delivered.

It is said in Benjamin on Sales, vol. 2, sec. 1032, as follows:

"If, on the other hand, the delivery is of a quantity less than that sold, it may be refused by the purchaser; and if the contract be for a special quantity to be delivered in parcels from time to time, the purchaser may return the parcels first received, if the later deliveries be not made, for the contract is not performed by the vendor's delivery of less than the whole quantity sold. But the buyer is bound to pay for any part that he accepts; and after the time for delivery has elapsed, he must either return or pay for the part received, and cannot insist on retaining it without payment, until the vendor makes delivery of the rest."

Mr. Justice Richmond in case of *Gomer v. McPhee*, 2 Colo. App. 287, 31 Pac. 119, quoting from *Richards v. Shaw*, 67 Ill, 222, said:

"It is a rule, supported by a very respectable weight of modern authority, that if the vendee of a specific quantity of goods sold under an entire contract receive a part thereof, and retain it after the vendor has refused to deliver the residue, this is a severance of the entirety of the contract, and the vendee becomes liable to the vendor for the price of such part. But he may reduce the vendor's claim by showing that he has sustained damage by the vendor's failure to fulfill his contract." The court further remarks that "although this rule may be a relaxation of the earlier and more generally received doctrine, that the entire performance, on the part of the vendor, of such a contract as the one in question, is a condition precedent to the payment of price, and the maintenance of an action for its recovery, the rule seems to be a fair and just one, and we are disposed to give it our acquiescence."

The true rule is clearly stated in case of *Saunders v. Short*, 86 Fed. 225, 30 C. C. A. 462, as follows:

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"The modern American rule seems to be that a party who has failed to perform in full his contract for the sale and delivery of personal property may recover compensation for the part actually delivered and received thereunder, less the damages occasioned by his failure to make the complete delivery."

In the case of *McDonough v. Evans Marble Co.*, 112 Fed. 634, 50 C. C. A. 403, it is said:

"The requests to charge presented by the plaintiff, and refused by the court below, were based on the theory that, the contract being entire, no recovery could be had for the tile delivered, accepted and placed in the building, unless the delivery of the balance covered by the contract had been waived or prevented by the defendant. These requests are based on the cases which hold that nothing can be recovered for part performance of an entire contract unless full performance has been waived or prevented, which cases are collected in note 19 to section 1032, 2 Benj. Sales, where the more modern rule laid down in *Britton v. Turner*, 6 N. H. 481, 26 Am. Dec. 713, and followed by the great weight of authority in this country since, is also discussed and approved. This rule is that a party who has failed to perform his contract in full may recover compensation for the part performed less the damage occasioned by his failure. The contract here was for the sale and delivery of tile, of which 19,752.5 feet were delivered and accepted, and the plaintiff was entitled to payment for the tile actually received and appropriated by the defendant, less the damages occasioned by his failure to deliver the balance.

. . . .

"There was no proof of damages sustained by failure of plaintiff to deliver the remainder of the tile, and the instruction of the court to render a verdict for the tile delivered, less the amount found to be defective, was correct, and the judgment is affirmed."

See, also, 6 R. C. L. 983, sec. 351; *Goodwin v. Merrill*, 13 Wis. 658; *Easton v. Jones*, 193 Pa. St. 147, 44 Atl. 264; *Gill v. Johnstown Lumber Co.*, 151 Pa. St. 534, 25 Atl. 120.

Appellant elected to retain the logs delivered and to rely upon its right to recover damages against respondent for fail-

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ure to fully perform his contract. Evidence was offered in support of the counterclaims and the jury, by its verdict, found no damages had been suffered and awarded to respondent a verdict for the balance due for the logs delivered according to the contract.

We find reversible error in the record and the judgment is accordingly affirmed. Costs are awarded to the respondent.

Budge, J., concurs.

SULLIVAN, C. J., Dissenting.—I am unable to concur in the conclusion reached by my associates. The action was brought upon the theory of, and the complaint alleged, a breach of the contract on the part of the appellant, the lumber company, and under the terms of the contract there was no breach shown on the part of the lumber company.

It was alleged in the complaint that the lumber company "verbally notified plaintiff to vacate and quit using said camp 4 spur." That allegation the evidence of the plaintiff himself shows is not true. On the petition for rehearing counsel for respondent for the first time contends that said contract is severable, and that an action might be maintained upon it by the plaintiff *pro tanto*. But this action was not brought nor prosecuted on that theory.

There is some conflict in the authorities as to what contracts are severable, some courts holding that where the subject matter is divisible and the terms of the contract do not show an intent to treat it as an entirety, and where by the terms of the contract monthly deliveries may be made, and the contract price for such deliveries by the terms of the contract become due upon receipt of the goods, then in the event of part performance, a recovery can be had upon the contract, *pro tanto*, without delivery of the full amount of property contracted for. And some courts hold that where a specific amount is named in the contract, regardless of the terms of payment for the deliveries so made, the contract is not severable, while in some states it is held that such contracts should

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be construed as severable where payments become due on delivery and that a recovery *pro tanto* may be had.

I do not think the contract in this case comes within the rule laid down in those states most liberal in construing contracts as severable so as to allow a recovery *pro tanto*. The very essence of this contract is entirety. By its express terms full performance is a condition precedent to have the deferred payments made,—in order to become entitled to the deferred payments. The acts of the lumber company in accepting and paying in part for monthly deliveries of logs and retaining part until the full amount of timber is delivered ought not to be declared a severance of the contract, for in doing as it did the lumber company was simply complying with an express condition of the contract taken in its entirety, and that was not a waiver by it of the condition precedent as to deferred payments, to wit, the full performance by the plaintiff before such payments became due.

In *Shinn v. Bodine*, 60 Pa. St. 182, 100 Am. Dec. 560, the court said:

“The entirety of a contract depends upon the intention of the parties and not on the divisibility of the subject. The severable nature of the latter may often assist in determining the intention, but will not overcome the intent to make an entire contract, when that is shown.”

See, also, 3 Page on Contracts, sec. 1485; 9 Cyc. 650, and authorities there cited.

The claim to recover *pro tanto* where advancements have been made, as in the case at bar, but the balance which is sought to be recovered is by the contract payable after complete performance, has been determined adversely by the Maryland court in a very important decision rendered since the article in Cyc. by Judge Lawson was written. (See *Oldewurtel v. Bevan*, 117 Md. 645, 84 Atl. 66.)

Counsel for respondent, before bringing this action, evidently conceived that it was necessary to show a breach of said contract on the part of the lumber company and brought action on that theory, and on rehearing he contends that the contract is severable, when under the express provisions of

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the contract the plaintiff agreed "to complete this contract by cutting, decking and delivering along said spur above mentioned all of the logs covered hereby, on or before the first day of November, 1912." And by paragraph 7 of said contract the payment for the logs was to be made as follows: "It is further agreed by and between the parties that the payment for said logs shall be made as follows: Four dollars (\$4.00) per thousand feet on the 15th day of each month for all logs scaled the previous month. The balance due the party of the first part to be paid ninety-one (91) days after the completion of this contract." The contract price for the white pine was \$8.50 per thousand feet, and for the other kinds of lumber, \$4.50 per thousand feet. It will thus be seen that the sum to be retained until the contract was completed was \$4.50 per thousand feet on the white pine and 50¢ per thousand feet on the other kinds of lumber, and the part retained did not become due until ninety-one days after the completion of the contract.

Under such a contract, to hold that a party may abandon the contract and recover the balance of the purchase price retained and not yet due, would be holding out or offering an inducement to a contractor to violate or abandon his contract whenever he concluded he could make money by doing so, with the understanding that the other party to the contract could only recover in any event the actual damage sustained by him by reason of such violation. Such a rule, it seems to me, places a premium on the violation of contracts, since under it the party injured could only recover the actual amount of his loss by reason of such violation and would be required to incur expensive litigation to recover that which would perhaps in the end result in a loss to him who has kept his contract.

Said contract is not severable, and as I view it, the plaintiff is not entitled to recover the part of the purchase price for the logs already delivered that was to be retained and not paid until the contract was completed.

The judgment ought to be reversed.

Points Decided.

(May 31, 1915.)

EMPIRE MILL COMPANY, a Corporation, Plaintiff, v. THE DISTRICT COURT OF THE EIGHTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BENEWAH, and Honorable JOHN M. FLYNN, Judge of said District Court, Defendants.

[149 Pac. 499.]

EMINENT DOMAIN—CONDEMNATION PROCEEDINGS—NOTICE—SUFFICIENCY OF TIME—DESCRIPTION OF PROPERTY—ABBREVIATIONS—DEFECTS IN PLEADINGS OR PROCEEDINGS AFFECTING RIGHTS OF PARTIES—DISTRICT COURT'S CONTROL OF ITS PROCESS.

1. Sec. 5226, Rev. Codes, being part of the title on eminent domain, provides for the appointment by the district court, upon ten days' notice, of commissioners to assess damages sustained by reason of the condemnation of the property described in the complaint, but does not provide what such notice shall contain, or in what way proof of service of notice may be made. Sec. 5228, Rev. Codes, of the same title, provides: "Except as otherwise provided in this title, the provisions of this code relative to civil actions and new trials and appeals, are applicable to, and constitute, the rules of practice in the proceedings in this title."

2. Where it appears from the record that the defendants in condemnation proceedings were not within the jurisdiction of the district court at the time notice for the appointment of commissioners to assess damages was sought to be served upon them under sec. 5226, Rev. Codes, and that service by mail was made upon them as provided by sec. 4890, Rev. Codes, such service was valid under the provision of sec. 5228, Rev. Codes, and the proof thereof may be established by competent evidence.

3. A technical construction should not be placed upon the procedure adopted in making service of notice for the appointment of commissioners under the eminent domain statute, as long as the proof establishes the fact that the service of such notice was actually made; and when so made, the court has jurisdiction to make the appointment.

4. Where service of notice for the appointment of commissioners, under the eminent domain statute, is made on March 31, 1915, fixing the date of hearing for the appointment of said commissioners on April 10, 1915, the ten days' notice required by the statute is given, the time being correctly computed under sec. 11, Rev. Codes.

Argument for Plaintiff.

5. In a notice of hearing on application for the appointment of commissioners in condemnation proceedings, the following description of land sought to be condemned, "Said land sought to be appropriated being a strip of land 50 feet in width over, upon and across the south half of the northwest quarter and the northwest quarter of southwest quarter of section 3, township 43 north of range 1, W. B. M., in Kootenai county, Idaho," is sufficient to identify the land sought to be condemned, when, in the same notice, reference is made, as a part thereof, to the complaint filed in the action, for a more complete description of the property; it being only required in such notice to apprise the owner how much of his land is to be condemned, what portion thereof and for what purpose, and it appearing from reference to the complaint that a competent surveyor could readily locate the land sought to be condemned.

6. The court will take judicial notice of the meaning of abbreviations in common use describing legal subdivisions of land by meridian, township and range.

7. In a proceeding of this nature the court will apply the rule prescribed in sec. 4231, Rev. Codes, viz., "The court must, in every stage of an action, disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the parties and no judgment shall be reversed or affected by reason of such error or defect."

8. Under the provisions of sec. 3862, Rev. Codes, the court has control of its process, and may order a defective summons so amended as to conform to the requirements of the statute, and after amendment may order it withdrawn from the files and served. (*Eidenbaugh v. Sandlin*, 14 Ida. 472, 125 Am. St. 175, 94 Pac. 827, cited and followed.)

Original application for a writ of prohibition. Demurrer to the petition sustained, *writ denied* and proceeding dismissed.

C. W. Beale, for Plaintiff.

The notice required by statute is jurisdictional, and must be given in strict conformity to the statute. A failure, therefore, to give the notice required is a fatal error, which if not waived by an appearance or otherwise, renders the proceedings absolutely void, even when called in question collaterally. (*Lewis on Eminent Domain*, 3d ed., secs. 570, 583.)

In the case of *Thomas v. Boise City*, 25 Ida. 522, 138 Pac.

Argument for Plaintiff.

1110, referring to a judgment of the lower court holding proceedings in a case where Boise City attempted to condemn certain property as unauthorized by law and null and void, where no personal notice was given to the defendant of intention to take his property in such proceedings, this court affirmed the judgment of the lower court. By the provisions of sec. 4894, Rev. Codes, such notice, being process, cannot be served by mailing.

This attempted service of notice on the auditor of Kootenai county is unauthorized by sec. 4144, Rev. Codes, as amended on pages 185 and 186, Sess. Laws of 1909. This court in *Brooks v. Orchard Land Co., Ltd.*, 21 Ida. 212, 121 Pac. 101, specifically held that the service of the summons under this statute on the county auditor was not personal. "Where a notice is required, and the mode of service is not specified, the law requires that it shall be personal." (*Chicago & Alton R. R. Co. v. Smith*, 78 Ill. 96; *Leach v. Carrigill*, 60 Mo. 316.)

As no provision has been made by the legislature of Idaho for constructive or substituted service of this notice during the absence of the officers of said applicant from Idaho, it was not within the power of either of said defendants herein to legislate in such case or to enact into our statutes some provision for the relief of said plaintiff in said action that had not been granted by our legislature. (Lewis on Eminent Domain, 3d ed., sec. 367; *In re Niagara Falls & W. Ry. Co.*, 108 N. Y. 375, 15 N. E. 429.)

The authority to condemn must be strictly construed. (Lewis on Eminent Domain, sec. 388; *Inspiration Con. Copper Co. v. New Keystone Copper Co.* (Ariz.), 144 Pac. 277.)

At the time the district court sustained applicant's motion to quash and set aside the service of the summons and complaint, and the former notice in said action, the original summons therein had been returned into court and had become *functus officio* and no longer a live and existing process in said action. (*Strode v. Strode*, 6 Ida. 67, 96 Am. St. 249, 52 Pac. 161.)

Argument for Defendant.

It is the rule of decision of this court that in giving a notice not within the provisions of sec. 11, Rev. Codes, the day of service is excluded; the first day of such notice does not count, and the first day of notice commences with the next day. (*Seawell v. Gifford*, 22 Ida. 295, Ann. Cas. 1914A, 958, 125 Pac. 182.)

Since the plain and reasonable construction of sec. 5226 requires ten days' notice to the adverse party before the day of hearing, a notice given at any time within such proposed ten days does not constitute ten days' notice; hence the pretended notice served on March 31, 1915, did not give ten days' notice prior to April 10, 1915. (*People ex rel. Platt v. Highway Commissioner*, 38 Mich. 247; *Coquard v. Boehmer*, 81 Mich. 445, 45 N. W. 996.)

Ezra R. Whitla, for Defendant.

This notice may be served as any notice may be served in any proceeding pending in any court. (Sec. 5228, Rev. Codes; *Chicago, Milwaukee & St. Paul Ry. Co. v. Trueman*, 18 Ida. 687, 112 Pac. 210.)

"Some statutes have provided in general language for the giving of reasonable notice of proceedings without specifying the form or manner of notice. Under such statutes it has been held that notice by publication or by mailing was sufficient." (Lewis on Eminent Domain, 3d ed., sec. 571.)

Notice served March 31st setting hearing for appointment of commissioners for April 10th is ten days' notice. (*Hannah v. Green*, 143 Cal. 19, 76 Pac. 708; *Bellmer v. Blessington*, 136 Cal. 3, 68 Pac. 111; *Dean v. Grimes*, 72 Cal. 442, 14 Pac. 178; *Young v. Krueger*, 92 Wis. 361, 66 N. W. 355; *Smith v. Force*, 31 Minn. 119, 16 N. W. 704; *Chaddock v. Barry*, 93 Mich. 542, 53 N. W. 785, 18 L. R. A. 337; *Ball v. Mander*, 19 How. Pr. (N. Y.) 468; *Foster v. Markland*, 37 Kan. 32, 14 Pac. 452; *Warner v. Bucher*, 24 Kan. 478; *Misch v. Mayhew*, 51 Cal. 514; *State ex rel. Currie v. Weld*, 39 Minn. 426, 40 N. W. 561; *Village of Excelsior v. Minneapolis & St. P. S. Ry. Co.*, 103 Minn. 407, 133 Am. St. 455, 120 N. W. 526, 17 Ann. Cas. 550;

Argument for Defendant.

Klein v. Tuhey, 13 Ind. App. 74, 40 N. E. 144; *Howbert v. Heyle*, 47 Kan. 58, 27 Pac. 116.)

With regard to sufficiency of description in notice the owner is presumed to know the description, and technicalities required of descriptions between persons who know nothing of the land are not, and should not be, indulged in as between owners thereof and those familiar with the location. (*Kuschke v. City of St. Paul*, 45 Minn. 225, 47 N. W. 786.) If the description contained in the complaint, together with the survey as shown on the map, is sufficient so that an engineer can locate the property with reasonable certainty, then the description is good. (2 Lewis on Eminent Domain, 3d ed., p. 980, par. 549; *Kansas City C. & S. R. Co. v. Story*, 96 Mo. 611, 10 S. W. 203; *Cory v. Chicago B. & K. C. Ry. Co.*, 100 Mo. 282, 13 S. W. 346; *Madera County v. Raymond Granite Co.*, 139 Cal. 128, 72 Pac. 915; *St. Louis, O. H. & C. Ry. Co. v. Fowler*, 113 Mo. 458, 20 S. W. 1069; *Hollister v. State*, 9 Ida. 651, 77 Pac. 339; *Fremont E. & M. V. R. Co. v. Mattheis*, 35 Neb. 48, 52 N. W. 698; *Collins v. Rupp*, 109 Ind. 340, 10 N. E. 91; *Casey v. Kilgore*, 14 Kan. 478.)

The courts take judicial knowledge of the abbreviations for meridian and range within their respective districts. (*Stanton v. Hotchkiss*, 157 Cal. 652, 108 Pac. 864; *McChesney v. City of Chicago*, 173 Ill. 75, 50 N. E. 191; *Armstrong v. Jarron*, 21 Ida. 747, 125 Pac. 170; *Taylor v. Wright*, 121 Ill. 455, 13 N. E. 529; *Jenkins v. M'Tigue*, 22 Fed. 148.)

"It is only where by reason of incorrect notice the defendant has been misled and where he might be injuriously affected by such variance that the court will take notice of mere irregularities." (*Harpold v. Doyle*, 16 Ida. 671, 102 Pac. 158.)

Under the provisions of sec. 3862, Rev. Stats., the court has control of its process, and may order a defective summons so amended as to conform to the requirements of the statute, and after amendment may order it withdrawn from the files and served. (*Ridenbaugh v. Sandlin*, 14 Ida. 472, 125 Am. St. 175, 94 Pac. 827; *Hancock v. Preuss*, 40 Cal. 572.)

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BUDGE, J.—This is an original application for a writ of prohibition to the district court of the eighth judicial district in Benewah county, and Hon. John M. Flynn, judge of said district court, commanding said court and judge to desist and refrain from entertaining jurisdiction of a motion for the appointment of commissioners, or to appoint commissioners to assess or determine the damage or damages which the petitioner will sustain, or is entitled to recover by reason of the appropriation or condemnation of a certain strip of land owned by the applicant, decribed in the notice of the Tyson Creek Ry. Co., said strip of land to be used for the construction, maintenance and operation of a railroad.

The applicant in its affidavits for the writ attacks the sufficiency of the notice for appointment of commissioners to assess damages, as well as the service of said notice, setting up in said affidavits substantially the following, as a statement of the proceedings had, upon which its objections are based:

On February 15, 1915, the Tyson Creek Railway Company, as plaintiff, commenced an action in the district court of the eighth judicial district for the county of Benewah, against the Empire Mill Company, a corporation, as defendant, by filing its complaint in said action. Thereafter an attempt was made to serve upon the defendant corporation by the plaintiff therein the summons and complaint and notice of motion for appointment of commissioners. After said attempted service, the defendant Empire Mill Company appeared specially and moved to quash and set aside the pretended service of said summons and notice, which motion was, on March 16, 1915, by the trial court granted. Thereafter on March 16, 1915, the attorney for the plaintiff secured an order from said district court authorizing the withdrawal of said original summons for reservice, and on March 31, 1915, made an attempt to serve the defendants with said summons and notice of motion for appointment of commissioners, by causing a copy of said summons and notice to be served by the sheriff of Kootenai county on D. E. Danby, auditor of said county. Prior to the service made upon the said Danby, the sheriff of Kootenai county made his return to said summons, to the effect that

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the president, secretary, cashier and managing agent of said corporation were all absent from the state of Idaho and none of the officers of said company could be found within the state of Idaho, and he therefore served said summons, complaint and notice for the appointment of commissioners on Danby, county auditor of Kootenai county. On April 10, 1915, the plaintiff filed the affidavit of one Emil Elder which, in substance and effect, sets out that said Elder is a citizen of Idaho of the age of twenty-one years, not a party to the action; that he was the deputy clerk of the district court, and deputy auditor and recorder of Kootenai county; that a copy of the summons and complaint and a copy of the notice for the appointment of commissioners in an action then pending in the district court of the eighth judicial district in Benewah county, wherein the Tyson Creek Railway Company was plaintiff and the Empire Mill Company defendant, was on March 31, 1915, by him deposited in the postoffice of the city of Coeur d'Alene directed to the Empire Mill Company, Harrison, Idaho, with the postage thereon prepaid; that said Empire Mill Company has its principal place of business and office at Harrison, Kootenai county, Idaho, about eighteen miles from Coeur d'Alene, between which places there is a regular communication of mail; and said papers were deposited in the postoffice of the city of Coeur d'Alene for the purpose of being delivered through United States mails to the Empire Mill Company at its place of business in Harrison, Kootenai county, Idaho.

On April 10, 1915, counsel for petitioner herein filed, in the district court of the eighth judicial district, in Benewah county, a motion to quash and set aside service of notice of motion for appointment of commissioners, and to quash and dismiss said notice and the motion for appointment of commissioners mentioned therein, basing said motion upon the files and records in the action, and upon the affidavits of Lawrence F. Connolly and John J. Connolly. Counsel for the Tyson Creek Railway Company filed the counter-affidavits of William Dollar and Harry Sawyer. Thereupon counsel for

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petitioner filed additional affidavits of Lawrence F. Connolly, Joseph J. Kroetch and Albert A. Kroetch.

The motion of the defendant to quash and set aside the service of plaintiff's notice of motion for appointment of commissioners served on March 31, 1915, in the manner as herein stated, came on regularly for hearing at Coeur d'Alene, Idaho, on April 28, 1915, before Judge John M. Flynn; C. W. Beale, Esq., appearing specially for defendant in support of said motion, and Ezra R. Whitla, Esq., appearing for plaintiff in opposition thereto.

The court having been informed of the contents of the affidavits of the respective parties, and after hearing the arguments of counsel denied the motion and ordered that said application of plaintiff for the appointment of commissioners be taken up and heard at Coeur d'Alene, on May 7, 1915, at 10 o'clock in the forenoon of said day.

In order to forestall the hearing of said motion for the appointment of said commissioners, and their appointment, counsel for Empire Mill Company applied to this court, and, upon an *ex parte* hearing, obtained an alternative writ of prohibition returnable on May 11, 1915, before this court at Coeur d'Alene.

Upon the return day fixed for the hearing upon said alternative writ, counsel for the Tyson Creek Railway Company interposed a demurrer to petitioner's application and affidavit for said writ of prohibition, and motion to quash; and, without waiving the objections urged in said demurrer and motion, filed the answer of the Tyson Creek Railway Company. Said matter thereafter came on regularly for hearing upon the demurrer and motion to quash.

The demurrer, in our opinion, raises all of the issues involved in this proceeding. We will therefore direct our attention first to the service of the notice for the appointment of commissioners to assess and determine the damages that defendant will sustain by reason of the condemnation and appropriation of the property described in the action. From the record in this case, the Empire Mill Company is composed of Lawrence F. Connolly and John J. Connolly, whose affidavits

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have been heretofore referred to. It also appears that, prior to the date upon which the service of summons and notice to appoint commissioners was quashed at a hearing had before the judge of the eighth judicial district, the Connollys were frequently within the jurisdiction of the court. Immediately subsequent, however, to the sustaining of said motion and the quashing of said service and notice for the appointment of commissioners, the Connollys absented themselves from the jurisdiction of the court and remained practically all of the time in the city of Spokane. Whether their absence was intentional or otherwise becomes immaterial, provided the service can be made in the manner in which, as appears from the record in this case, it was made.

The proceeding to condemn land under sec. 5226, Rev. Codes, is a summary proceeding; the object and purpose of the statute being to enable a party, who, under the law, is authorized to condemn land under said section upon a compliance therewith to obtain the immediate possession of the land sought to be condemned, in order to put said land to the particular public use intended with as little hindrance as possible. Said section provides, *inter alia*: "That at any time after the commencement of proceedings in the district court, as provided for in this title, to condemn property, and upon ten days' notice to the adverse party, the district court or the judge thereof may appoint three disinterested persons, who shall be residents of the county in which the land is situated, as commissioners to assess and determine damages that the defendant will sustain by reason of the condemnation and appropriation of the property described in the complaint, and the said commissioners shall, before entering upon the discharge of their duties, take and subscribe an oath to faithfully and impartially discharge their duties as such commissioners." It will be observed upon reading sec. 5226 that it fails to provide what the notice shall contain, how service shall be made, or in what manner proof of service of notice may be made. Sec. 5228, Rev. Codes, which is a part of the title on eminent domain, provides: "Except as otherwise provided in this title, the provisions of this code relative to civil actions

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and new trials and appeals, are applicable to, and constitute, the rules of practice in the proceedings in this title." In *Chicago, Milw. & St. Paul Ry. Co. v. Trueman*, 18 Ida. 687, 112 Pac. 210, this court said: "It will be observed that this latter section [sec. 5228] makes the provision of the code relative to civil actions applicable, 'except as otherwise provided in this title.' "

Sec. 4890, Rev. Codes, provides: "Service by mail may be made where the person making the service and the person on whom it is made reside, or have their offices, in different places between which there is a regular communication by mail."

Sec. 4891, Rev. Codes, provides: "In case of service by mail the notice or other paper must be deposited in the postoffice, addressed to the person on whom it is to be served, at his office or place of residence, and the postage paid. The service is complete at the time of the deposit. . . . "

From the record in this case it is established that on March 31, 1915, the Connollys were not within the jurisdiction of the district court of the eighth judicial district, when the notice for the appointment of commissioners was served upon the auditor of Kootenai county, and when said notice was mailed by the auditor's deputy to the Empire Mill Company at Harrison, Idaho, where their regular place of business is located. That the notice for the appointment of commissioners was served in the manner, at the time, and upon the person as set out in the sheriff's return is not denied; neither is the fact controverted that the notice of intention to appoint commissioners was regularly mailed by Elder, addressed to the place of business of the petitioner.

We are of the opinion that, under a statute such as we have in this state, which is silent in so far as the manner and proof of service of notice to appoint commissioners is concerned, service by mail as provided by sec. 4890, Rev. Codes, *supra*, constitutes a valid service and the proof of said service may be established by proper legal testimony, either oral or in writing.

There is no denial in this case that the Empire Mill Company received the notice for the appointment of the commis-

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sioners. The contention of counsel for petitioner is directed against the manner of service; that the service cannot be made upon the Empire Mill Company in any other way than by personal service upon the president, secretary, or other officer of the company designated in the statute upon whom service might be made, in an ordinary action at law. We cannot agree with counsel upon this proposition. As we view it, it is not so much a question of mere service, or the means adopted in order to obtain the service, but rather *the fact of service*, which would confer upon the court the jurisdiction to appoint the commissioners. No undue advantage could possibly be taken of petitioner by reason of the appointment of the commissioners. No snap judgment could be taken. Objections to the personnel of the commission could not be urged until after said commission was appointed. Sec. 5226, Rev. Codes, *supra*, provides expressly that said commissioners so appointed must be disinterested; that they must be residents of the county in which the land is situated; that they "shall give at least five days' notice in writing of the time and place where they will meet for the purpose" of determining the damage that the defendant will sustain by reason of the condemnation and appropriation of the property described in the complaint, "which place, unless agreed upon between the two parties, shall be within five miles of the premises aforesaid." In view of the fact that the statute requires commissioners to give notice of the time and place of the hearing, there is no reason why a technical construction should be placed upon the method of mere service of the notice for the appointment of commissioners, so long as the proof establishes the fact that the service of the notice was in truth and in fact made; and when so made, the court has jurisdiction to make the appointment.

Counsel's objection was not that he had not sufficient time between the hearing of the application for the appointment of the commissioners and the time when said commissioners would be appointed within which to prepare to resist the appointment, or to make all necessary preparation for the hearing, but that he had not been duly notified of the time when

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the commissioners would be appointed. (*Burden v. Stein*, 25 Ala. 455.) Had counsel requested a continuance of the cause for this purpose, no doubt the same would have been granted, the court having power so to do. (*Bowman v. Venice & Carondelet Ry. Co.*, 102 Ill. 472.)

Counsel for Empire Mill Company contends that the service of the notice for the appointment of commissioners on March 31, 1915, fixing the date of hearing for the appointment of said commissioners on April 10, 1915, is not ten days' notice. Sec. 11, Rev. Codes, provides: "The time in which any act provided by law is to be done is computed by excluding the first day, and including the last, unless the last day is a holiday, and then it is also excluded." Sec. 12 of part 1, California Code of Civil Procedure, contains the same provision as section 11 of the Idaho Revised Codes, and has been frequently construed by the supreme court of California. In the case of *Misch v. Mayhew*, 51 Cal. 514, in construing said section 12, the court held: "In a contest concerning an election to an office, the three days' notice which a party who relies on illegal votes given for his adversary must give of the illegal votes he expects to prove are to be computed by including the first day and excluding the last." In that case the trial took place on the 10th and the list was served on the 7th. The court held that that was three days' notice. Learned counsel for the petitioner in the case at bar contends that the time intervening between March 31, 1915, and April 10, 1915, in order to constitute ten days' notice under sec. 5226, Rev. Codes, must include the whole of the tenth day of April and up to and on to the eleventh day of April, and that, as the notice was served on the 31st day of March, the full ten days had not expired. In answer to a like contention, the supreme court of California, in the case above cited, held that the contention was without merit.

In the case of *Hannah v. Green*, 143 Cal. 19, 76 Pac. 708 the court said: "Appellant contends that the court erred in denying his motion to dismiss the proceedings upon the ground that there had not been a compliance with sec. 1118, Code Civ. Proc., in that the day named in the order for a

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special session of the court to hear the contest was less than 10 days from the date of the order, but this contention is not maintainable. The statement of contest was filed on December 1, 1902, and the order was made on that day fixing the 11th of that month for the hearing. This was 'not less than ten days.' "

In the case of *Bates v. Howard*, 105 Cal. 173, 38 Pac. 715, the court said: "The notice posted on the 12th day of July, giving notice of a hearing of the petition on the 22d day of the same month, was sufficient as a 10-days' notice, under sec. 1373 of the Code of Civil Procedure. Sec. 12 of the Code of Civil Procedure provides that 'the time within which any act provided by law is to be done is computed by excluding the first day and including the last, unless the last day is a holiday, and then it is also excluded.' "

It is next contended by counsel for Empire Mill Company, that the description of the property contained in the notice is insufficient to give the court jurisdiction. The notice contains the following (after entitling the court and the cause):

"To the Empire Mill Company, a Corporation, the Above-named Defendant.

"You will please take notice that the plaintiff in the above-entitled action will move the Honorable R. N. Dunn, one of the judges of the above-entitled court, at the court room in the City of Coeur d'Alene, Kootenai County, State of Idaho, on the 10th day of April, A. D. 1915, at the hour of ten o'clock A. M. of said day, for an order appointing commissioners to assess the damages which the defendant will sustain, or is entitled to by reason of the appropriation and condemnation of the lands of the defendant as prayed for in the complaint filed in this action and to which said complaint reference is hereby made as a part of this notice for further description of the property and objects of said condemnation.

"Said land sought to be appropriated being a strip of land 50 feet in width over, upon and across the South half of the Northwest quarter and the Northwest quarter of South-

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west quarter of Section 3, Township 43, North of Range 1, W. B. M., in Kootenai County, Idaho, and being sought to be taken for the purpose of constructing a line of railroad upon, over and across the same."

The land in question is located in Benewah county. The notice inadvertently omitted the word "Benewah" and inserted the word "Kootenai." All of the pleadings, however, are entitled, "In the District Court of the Eighth Judicial District of the State of Idaho in and for the County of Benewah," and with the exception of the notice, refer to the lands as being located in Benewah county.

Sec. 5226, Rev. Codes, *supra*, which provides for the giving of the notice for the appointment of commissioners, fails to provide what such notice shall contain, but that "upon ten days' notice to the adverse party, the district court or the judge thereof may appoint . . . commissioners."

In *Ex parte Bennett*, 26 S. C. 317, 2 S. E. 389, the court held a petition to be sufficient which set forth that the petitioner was desirous of constructing a railroad from G. to W. over and across the lands of B., that the company's railway would extend about three-fourths of a mile through the lands of said B., and that it should be 100 feet wide.

The notice in question in this case gives the section, township and range, and we think is sufficiently definite to apprise the owner of what and how much of his land is to be condemned, and for what purpose. As held in the case of *Kuschke v. City of St. Paul*, 45 Minn. 225, 47 N. W. 786: "The notice was not for the information of strangers to the property . . . but of the owners of and persons interested in it. If it contained enough, in connection with what they already had notice of, to apprise them what property was to be taken, the purpose of notice was accomplished."

This notice refers to the verified complaint for a further description of the property sought to be condemned, and upon examination of the verified complaint and map attached thereto, it is apparent to our mind that a competent surveyor could very readily locate the land sought to be taken by the plaintiff. In the case of *St. Louis O. H. & C. Ry. Co. v.*

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Fowler, 113 Mo. 458, 20 S. W. 1069, the court said: "There is no doubt but the petition may, as does this one, refer to a plat filed therewith for an accurate description of the property sought to be taken; and, if well described on the plat, that is sufficient. The plat in this case appears to be prepared with care, and, since it specifies the scale on which it is made, it cannot be difficult for a surveyor to locate the strip with certainty; and, that being so, the description is sufficient." In *Lewis on Eminent Domain*, 3d ed., sec. 550, p. 982, we find the following rule stated: "Though a petition does not give the county, state or meridian; yet if it gives the section, township and range, and it is fairly inferable from the petition that the property is in the county where the petition is presented, it will be sufficient."

Counsel for the Empire Mill Company, with his well-known zeal and learning, strenuously objects to the use of abbreviations for meridian, township and range. In the case of *Stanton v. Hotchkiss*, 157 Cal. 652, 108 Pac. 864, the court said: "Courts will take judicial notice of government surveys of public lands," and as said in the case of *McChesney v. City of Chicago*, 173 Ill. 75, 50 N. E. 191: "The court will take judicial notice of the meaning of such abbreviations." We think that the description given in the complaint and the notice was sufficient in so far at least as the question of the sufficiency of the notice is concerned, and we do not deem it necessary at this time to pass upon the sufficiency of the complaint.

Many of the objections urged and so ably contended for by counsel are purely technical and do not, in view of section 4231, Rev. Codes, apply in a proceeding of this nature. Said section provides: "The court must, in every stage of an action, disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the parties and no judgment shall be reversed or affected by reason of such error or defect." In the case of *Fegtly v. Village Blacksmith Min. Co.*, 18 Ida. 536, 111 Pac. 129, this court said: "We are admonished by the provisions of sec. 4231 of the Rev. Codes that, 'The court must, in every stage of an

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action, disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect.' In view of the admonition of the foregoing provisions of the statute, we would not feel justified in holding that the court committed error in overruling the demurrer to the complaint in this case or that it was reversible error to admit the evidence offered by the plaintiff as to the corporate existence of the defendant, and the action and conduct of its board of directors in reference to the contract and transactions involved in the action." In the case of *Harpold v. Doyle*, 16 Ida. 671, 102 Pac. 158, this court said: "It is only where by reason of an incorrect notice the defendant has been misled and where he might be injuriously affected by such variance that the court will take notice of mere irregularities. Under the provisions of sec. 4231, Rev. Stats., this court is directed in every stage of an action to disregard any errors or defects in the proceedings which do not affect the substantial rights of the parties."

All of the irregularities pointed out by counsel in the proceedings leading up to and including the service of the notice for the appointment of commissioners are such that the substantial rights of the defendants can in no wise be injuriously affected.

It appears from the affidavit in support of the petition for the alternative writ of prohibition, that the original summons in this case was filed on February 15, 1915, and on March 16, 1915, was, by order of the court, quashed. Thereafter, on March 16, 1915, the Hon. John M. Flynn, District Judge, upon application of the plaintiff Tyson Creek Railway Company, made an order authorizing the withdrawal of the original summons from the files of this action for the purpose of serving the same upon the defendant. Counsel for petitioner contends that this action upon the part of the court was void; that the summons was *functus officio*, and no longer a live and existing process in said action. That being true, counsel insists that the service of the notice to appoint commissioners was invalid. This court has already passed upon

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this question contrary to counsel's contention, in the case of *Ridenbaugh v. Sandlin*, 14 Ida. 472, 125 Am. St. 175, 94 Pac. 827, in the following language:

"Under the provisions of sec. 3862, Rev. Stats., the court has control of its process, and may order a defective summons so amended as to conform to the requirements of the statute, and after amendment may order it withdrawn from the files and served.

"A summons once returned and filed with the papers in the case becomes a file of the court which cannot be withdrawn without permission of the court, *but the court may order it withdrawn and served upon any defendant in the case.*

"As soon as it becomes a file of the court, it is beyond the power of any party to the action to withdraw it without an order of court to that effect; but the court itself has control over the records and files in a case as well as over its own process, and it might order a summons already issued and on file to be withdrawn for service, or order an entirely new summons, as justice and the exigencies of the case may demand."

An order was made as heretofore stated, by the trial judge, for the withdrawal of said summons. The statutes in this respect were fully complied with.

There is no merit in counsel's contention, in so far as it affects the service of the notice for the appointment of commissioners.

It therefore follows that the demurrer to the application and affidavits must be sustained and the writ of prohibition denied, and it is so ordered. Costs are awarded to defendants.

Sullivan, C. J., and Morgan, J., concur.

Argument for Defendant.

(May 31, 1915.)

EMPIRE MILL COMPANY, a Corporation, Plaintiff, v.
DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT, IN AND FOR SHOSHONE COUNTY, and
HONORABLE JOHN M. FLYNN, Acting Judge of said
District Court, Defendants.

[149 Pac. 505.]

This is a companion case to that of *Empire Mill Company v. District Court of the Eighth Judicial District of and for Benewah County, and Hon. John M. Flynn, Judge of said District Court, ante*, p. 383, 149 Pac. 499, and on the authority of the case, the writ of prohibition is denied.

Original application for a writ of prohibition. Demurrer to the petition sustained, *writ denied* and proceeding dismissed.

C. W. Beale, for Plaintiff, files same brief as in companion case, *ante*, p. 383.

John P. Gray, for Defendant.

If this notice is not process, then service by mail would satisfy the requirements of the code. If it is process, then its service must be in accordance with sec. 4144, Rev. Codes, as amended by the 1909 Sess. Laws, p. 185, which provides that service of summons in an action may be had upon the president, secretary, cashier or managing agent, and in case they shall be absent from the state, then service may be made by delivering a copy of the summons and a copy of the complaint to the auditor of the county in which the principal place of business of such corporation is located.

"In regard to the kind of notice which will satisfy the requirements of the constitution in proceedings to take land for public use, the authorities almost universally hold that notice by publication or by posting is sufficient, even with

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respect to persons residing within the jurisdiction where the proceedings are pending." (Lewis on Eminent Domain, 3d ed., sec. 568; *Golden Gate Hydraulic M. Co. v. Superior Court*, 65 Cal. 187, 3 Pac. 628.) Sec. 5228, Rev. Codes, makes the general provisions of the code relative to service of actions applicable to the proceedings under the eminent domain title, except as otherwise specifically provided. (*Chicago, M. & St. P. Ry. Co. v. Trueman*, 18 Ida. 687, 112 Pac. 210.)

BUDGE, J.—This is an original application of the Empire Mill Company for writ of prohibition to the district court of the first judicial district in Shoshone county, and Hon. John M. Flynn, acting judge of said district court, commanding said court and judge to desist and refrain from entertaining jurisdiction of a motion for the appointment of commissioners, or to appoint commissioners to assess and determine the damages that the applicant will sustain by reason of the condemnation and appropriation of its property by the Blackwell Lumber Company for the construction, maintenance and operation of a temporary logging railroad. In its application petitioner attacks the sufficiency of the notice for the appointment of said commissioners, as well as the service of the notice upon the applicant, and in support of said application sets up affidavits of the same character, and bases arguments upon the same grounds as in the case of the *Empire Mill Company v. District Court of the Eighth Judicial District Court, in and for Benewah County, and Hon. John M. Flynn, Judge of said District Court*.

The case of *Empire Mill Co. v. District Court of the Eighth Judicial District, supra*, was decided by this court at its May, 1915, term, and reported *ante*, p. 383, 149 Pac. 499, and upon the authority of that case the demurrer to the application for the writ in the case at bar is sustained, and costs awarded to defendants.

Sullivan, C. J., and Morgan, J., concur.

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(May 31, 1915.)

I. F. TAPPIN, Appellant, v. THOMAS McCABE, as Sheriff
of Shoshone County, Respondent.

[149 Pac. 460.]

**CHattel Mortgage—Foreclosure—Must Allege Compliance With
Statute—Possession of Personal Property—Sale.**

1. Sec. 3413, Rev. Codes, as amended (Sess. L. 1909, p. 149), provides: "In proceeding to foreclose by notice and sale, the mortgagee, his agent or attorney, must make an affidavit stating the date of the mortgage, the names of the parties thereto, a full description of the property mortgaged, and the amount due thereon. Such affidavit shall be sufficient authority to demand and receive possession of the property, if the same can be taken peaceably, but if it cannot be so taken, then such affidavit must be placed in the hands of the sheriff of the county or the constable in the precinct where the property is located, together with a notice signed by the mortgagee, his agent or attorney, requiring such officer to take the mortgaged property into his possession and sell the same."

2. *Held*, that where the plaintiff failed to allege in his amended complaint that the mortgagee, his agent or attorney made an affidavit as required by sec. 3413, Rev. Codes, as amended by Sess. Laws 1909, p. 149, and upon such affidavit demanded the possession of the property described in the chattel mortgage which he sought to foreclose by affidavit and notice, which demand was thereupon refused by the mortgagor, and by reason thereof such affidavit and notice was placed in the hands of the sheriff, said amended complaint was subject to a general demurrer upon the ground that the same did not state facts sufficient to constitute a cause of action.

3. *Held*, that it was incumbent upon the plaintiff to allege in his amended complaint that he had fully complied with sec. 3413, Rev. Codes, as amended by Sess. Laws 1909, p. 149, before a right of action could be maintained against the defendant as sheriff, for his failure or refusal to take into his possession the personal property described in the chattel mortgage under an affidavit and notice of sale, and sell the same.

APPEAL from the District Court of the First Judicial District for Shoshone County. Hon. William W. Woods, Judge.

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Action for damage against the sheriff of Shoshone county for alleged failure and refusal to take into his possession personal property described in a chattel mortgage under an affidavit and notice of sale. Demurrer to amended complaint sustained by the trial court. Judgment *affirmed*.

T. P. Wormward, for Appellant, cites no authorities.

J. E. Gyde, for Respondent.

The respondent, as sheriff of Shoshone county, had no authority to sell the mortgaged property in question until appellant had demanded possession of the property and peaceable possession thereof could not be obtained, and the complaint failing to show such demand and failure to obtain peaceable possession by the mortgagee is subject to demurrer. (Sec. 3413, Rev. Codes, as amended by 1909 Sess. Laws 149.) For a construction of the statute before amendment, see *Rein v. Callaway*, 7 Ida. 634, 65 Pac. 63.

A sheriff is not responsible for dereliction of duty in failing to execute process if the person demanding the execution thereof has other means at hand to secure his demands. (*Townsend v. Libbey*, 70 Me. 162; *Clark v. Smith*, 10 Conn. 1, 25 Am. Dec. 47.)

"A plaintiff cannot recover damages from a sheriff on account of negligence by which an attempted writ was rendered ineffectual, if he contributed to the result by his own negligence." (*Parrott v. McDonald*, 72 Neb. 97, 100 N. W. 132.)

BUDGE, J.—This is an action brought in the district court of the first judicial district for Shoshone county, against the sheriff of said county for failure to take possession of a certain portion of the personal property described in a chattel mortgage, and sell the same to satisfy the balance due upon an alleged indebtedness to the plaintiff by the mortgagor by notice and sale upon an affidavit by the mortgagee, as provided under sec. 3413, Rev. Codes, as amended by Sess. L. 1909, p. 149.

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The plaintiff, in his amended complaint, alleges, *inter alia*, that the defendant is now, and at all times since the month of January, 1913, has been, the duly elected, qualified and acting sheriff of Shoshone county; that on May 7, 1912, one H. D. Bishop made, executed and delivered to the plaintiff, A. F. Tappin, a chattel mortgage on certain personal property described in the plaintiff's amended complaint, as security for the payment of a certain promissory note in the sum of \$700 due one year from May 7, 1912, bearing interest at seven per cent per annum from date until paid; that said chattel mortgage was in due form and properly acknowledged; that thereafter on May 23, 1913, the full amount of said note remained unpaid; that the property was within the jurisdiction of the defendant sheriff upon the date when the plaintiff, in writing, demanded of the defendant that he, in his official capacity, take into his possession, under and by virtue of said chattel mortgage, for the purpose of foreclosure and sale, a certain portion of the personal property described in said chattel mortgage; that the defendant sheriff wrongfully and negligently failed and refused so to do, and to sell the same pursuant to the demand of the plaintiff. Plaintiff thereafter sets out the reasonable market value of said portion of the mortgaged personal property and demands judgment for \$371, together with interest thereon at the rate of seven per cent per annum, from said May 23, 1913, and down to the rendition of the judgment in the action, together with costs and disbursements.

To the amended complaint the defendant filed both a special and general demurrer. The demurrer was sustained by the trial court. Plaintiff refused to amend or plead further, and thereupon judgment of dismissal was entered in favor of the defendant. This is an appeal from the judgment sustaining the demurrer.

There are no distinct enumerations of error set out in appellant's brief as required by rule No. 45 of this court. That rule should be complied with by counsel for appellants in preparing briefs. There is, however, what are designated as "points of error," from which we gather that the error re-

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lied upon by appellant is, that the court erred in sustaining respondent's demurrer to appellant's amended complaint upon the ground and for the reason that the appellant had failed to allege in his amended complaint that the mortgagee, his agent or attorney, made an affidavit as required by sec. 3413, Rev. Codes, as amended by Sess. L. 1909, p. 149, setting out the names of the parties thereto, a full description of the property mortgaged and the amount due thereon, and under such affidavit demanded the possession of the property described in the chattel mortgage, which demand was refused by the mortgagor, and that, by reason of such refusal of the mortgagor to deliver the possession of said mortgaged property to the mortgagee to be sold and the proceeds applied upon the indebtedness due from the mortgagor to the mortgagee, such affidavit and notice was placed in the hands of the sheriff of Shoshone county, Idaho, together with the notice signed by the mortgagee, his agent or attorney, requiring such sheriff to take the mortgaged property into his possession and sell the same.

Sec. 3413, Rev. Codes, as amended, *supra*, provides: "In proceeding to foreclose by notice and sale, the mortgagee, his agent or attorney, must make an affidavit stating the date of the mortgage, the names of the parties thereto, a full description of the property mortgaged, and the amount due thereon. Such affidavit shall be sufficient authority to demand and receive possession of the property, if the same can be taken peaceably, but if it cannot be so taken, then such affidavit must be placed in the hands of the sheriff of the county or the constable in the precinct where the property is located, together with a notice signed by the mortgagee, his agent or attorney, requiring such officer to take the mortgaged property into his possession and sell the same." .

Prior to the amendment of said sec. 3413, it was not necessary for the mortgagee, desiring to foreclose a chattel mortgage by affidavit and notice, to make a demand upon the mortgagor; in fact, this court held in the case of *Rein v. Callaway*, 7 Ida. 634, 65 Pac. 63, that under the statutes of this state a mortgagor could not lawfully authorize the mortgagee, by

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provisions made in a chattel mortgage, to take possession of the mortgaged property and sell the same, and apply the proceeds thereof to the payment of the indebtedness due from the mortgagor to the mortgagee, but restricted the sale of said mortgaged property to a foreclosure and sale by affidavit and notice of sale placed in the hands of the sheriff or constable under sec. 3390, Rev. Stats., or by an action in the district court for the foreclosure of said chattel mortgage, which said two methods were held to be exclusive. However, the legislature, by the enactment of said amendment to sec. 3413, *supra*, evidently intended to protect the debtor against the costs and expenses incident to a foreclosure and sale upon affidavit and notice, by providing that the mortgagee, his agent or attorney, should make an affidavit as provided in said amendment, and thereupon demand the possession of said mortgaged property, and if he could receive the same peaceably, or in other words, if the mortgagor and the mortgagee could mutually agree upon the delivery to the mortgagee of the mortgaged property, that the same should be delivered to the mortgagee and by him sold, in like manner as if sold by the sheriff or constable, and the proceeds from the sale of said mortgaged property credited upon the indebtedness due the mortgagee. If possession of said mortgaged property was denied the mortgagee upon demand made as provided in said sec. 3413, as amended, it then became the duty of the mortgagee to place said affidavit and notice of sale in the hands of the sheriff of said county or constable of the precinct where the property was located with directions to such officer to take such mortgaged property into his possession and to sell the same as provided by law.

We are of the opinion that it was the duty of the appellant to have alleged in his amended complaint a full compliance with the provisions of the statute as herein referred to, and that by reason of his failure so to do said amended complaint was subject to the respondent's demurrer, and that the court did not err in sustaining the same.

An action cannot be maintained against an officer for his neglect or refusal to take into his possession, upon an affidavit and notice, personal property under a chattel mortgage, un-

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less it is alleged in the complaint and proven upon the trial that the mortgagee has exhausted his statutory remedy, if he elects to avail himself of such statutory remedy, wherein it is expressly provided that he is required, under an affidavit, to demand the possession of the chattels covered by the chattel mortgage for the purpose of selling the same to satisfy or apply upon an indebtedness due from the mortgagor, and that he has been unable to secure the possession of said chattels peaceably.

The judgment is affirmed, and costs awarded to respondent.

Sullivan, C. J., and Morgan, J., concur.

(March 27, 1915.)

J. W. SMITH, Respondent, v. FARIS-KESL CONSTRUCTION COMPANY, LTD., and EMMETT IRRIGATION DISTRICT, Appellants.

[150 Pac. 25.]

CANAL CONSTRUCTION—MECHANIC'S LIEN—CLASSIFICATION OF MATERIALS REMOVED—EXPERT TESTIMONY—CONFLICT OF EVIDENCE—CONTRACT—DISAGREEMENT BETWEEN PARTIES—ENGINEER'S ESTIMATES—FRAUD OR MISTAKE—STIPULATION IN CONTRACT—TENDER—INTEREST—ATTORNEYS' FEES—LACHES—LIS PENDENS—WAIVER OF LIEN—SUBROGATION—PLEADING—TITLE SUBJECT TO LIEN—COSTS.

1. The classification of different kinds of material removed in the construction of a canal was the subject of difference of opinion between expert witnesses, and a trial court is not required to adopt, as a whole, the estimates or opinions of certain witnesses as against those of other witnesses.

2. The record in this case examined and found to come well within the established rule in this state that where there is a substantial conflict in the evidence, the appellate court will not disturb the findings or judgment of a trial court.

3. It is a well-established rule of law that where the contract provides that an engineer or architect shall be the umpire, or final arbitrator, between the parties should disagreement arise between

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them growing out of the contract, in the absence of fraud or mistake or such undue influence or collusion as amounts to fraud, in making the estimates of the amount of work performed under the contract, the parties thereto are bound by such estimates.

4. In this case it was not stipulated in the contract that the estimates of the engineer should be final, binding or conclusive upon the parties; therefore such estimates were subject to attack for inaccuracy, and it was proper for the trial court to consider all the evidence offered and admitted touching the amount, character and classification of material handled by the respondent in the construction of the canal.

5. One of the appellants, before the commencement of the action, tendered to the respondent, in full payment of the amount due to him, a sum of money which was less than was found to be due by the court, which tender was rejected. Since the said sum was tendered, not as a partial payment, but as settlement in full, and since it was less than the amount found to be due by the court, such tender did not estop the accumulation of interest upon any part of the debt.

6. While the appellant construction company which employed the respondent does not own the property against which the lien is sought to be foreclosed, it owes the money sued for, and it was by reason of its failure to pay its debt that the expense of employing respondent's attorneys was incurred. The attorneys' fee is an incident of the judgment against said appellant, and it is liable therefor under sec. 5121, Rev. Codes.

7. When an issue of laches is presented by the answer of one of the appellants and it appears from the record that the trial of the case was commenced the next day after said appellant filed its answer; that its codefendant made no complaint of the delay which had theretofore occurred and that no motion to dismiss the action for failure to prosecute was made; and when the record does not disclose that said delay was due to the fault of the respondent, nor that either of the appellants was injured thereby; and when the record fails to disclose any fact from which it may be inferred that it was ever the intention of the respondent to abandon his claim of lien, the finding of the trial court that respondent was not guilty of laches will not be disturbed.

8. Lapse of time alone is not sufficient to justify a dismissal of the action. Where a defense of laches is sustained, it is upon the theory that the delay, together with other circumstances in the case, satisfactorily shows that the cause of action has been abandoned, or because it satisfactorily appears that it has resulted in injury to someone not responsible for the delay, and unless it does

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so appear, or if the theory, or presumption, is overcome by other facts and circumstances, the defense should not prevail.

9. Sec. 4142, Rev. Codes, provides for the filing of a *lis pendens* in actions affecting the title to or right of possession of real property, but this is necessary only for the purpose of giving record notice to subsequent purchasers and encumbrancers of the property who have not actual knowledge of the action, or of the claim upon which it is based, and, where a subsequent purchaser has full knowledge of a mechanic's lien in a suit to foreclose such lien, a contention that in order to charge such purchaser with notice of the pendency of the suit a *lis pendens* must be filed cannot be sustained.

10. In order to establish a waiver of lien the intention to waive must clearly appear, and such waiver will not be presumed or implied, contrary to the intention of the party whose rights would be injuriously affected thereby unless by his conduct the opposite party was misled to his prejudice into the honest belief that such waiver was intended or consented to. The facts in this case considered and held not to constitute a waiver of the lien but only the priority thereof to a certain mortgage.

11. Facts must be alleged upon which a claim of subrogation is based, and where no such facts appear in the pleadings, it is not error for the trial court to refuse to grant such relief.

12. A mechanic's lien extends only to such right, title and interest as the owner, at whose instance the improvement was made, had in the property at the time the lien attached, and a purchaser at a sale to satisfy said lien can acquire no greater right, title or interest than that.

13. In this case the lien attached to such right, title and interest as the Canyon Canal Company, Limited, had in the property at the time such lien attached to it, subject to the prior lien, if any, now existing and to the same extent does exist, of a certain mortgage given to secure the payment of bonds of said canal company in the sum of \$350,000.

14. The right to recover costs is statutory, and the prevailing party cannot recover his costs unless he conform to the provisions of the statute.

15. The phrase, "decision of the court," as used in sec. 4912, Rev. Codes, refers to a formal decision, or findings of fact, conclusions of law and decree, or judgment, and a memorandum of costs and disbursements filed prior to the making of such formal decision is prematurely filed, and a motion to strike the same from the files upon that ground should be sustained.

Argument for Appellant.

APPEAL from the District Court of the Third Judicial District for Ada County. Hon. Carl A. Davis, Judge.

Suit to foreclose mechanic's lien. Judgment for plaintiff. *Modified.*

Martin & Cameron and Perky & Crow, for Appellant Faris-Kesl Construction Co.

Sullivan & Sullivan and Richards & Haga, for Appellant Emmett Irrigation Co.

A judge cannot make a finding inconsistent with the claims and proofs of both parties and inconsistent with the evidence in the case. (*King v. Bendell Com. Co.*, 7 Colo. App. 507, 44 Pac. 377; *Robeson v. Miller*, 4 Colo. App. 313, 35 Pac. 880; *State ex rel. Kimbrell v. People's Ice Storage etc. Co.*, 246 Mo. 168, 151 S. W. 101.)

In order to charge purchasers with notice of the pendency of an action it must be diligently prosecuted, and in addition under our statutes notice of *lis pendens* must be filed where the suit affects real property. (*Bybee v. Summers*, 4 Or. 354, 360; *Taylor v. Carroll*, 89 Md. 32, 42 Atl. 920, 44 L. R. A. 479; *Bridger v. Exchange Bank*, 126 Ga. 821, 115 Am. St. 118, 56 S. E. 97, 8 L. R. A., N. S., 463; *Hayes v. Nourse*, 114 N. Y. 595, 11 Am. St. 700, 22 N. E. 40; *Watson v. Wilson*, 2 Dana (Ky.), 406, 26 Am. Dec. 459; *Richardson v. White*, 18 Cal. 102; *Warrnock v. Harlow*, 96 Cal. 298, 31 Am. St. 209, 31 Pac. 166.)

A mechanic, contractor or laborer may waive his lien, and respondent by his contract waived his entire lien and not merely such priority as he might have had over the mortgage. (27 Cyc. 262, 264; 20 Am. & Eng. Ency. of Law, 494; Bloom, Mechanics' Liens, 627, 630; *Idaho Gold Min. Co. v. Winchell*, 6 Ida. 729, 96 Am. St. 290, 59 Pac. 533; *Bowen v. Aubrey*, 22 Cal. 566.)

There is also an implied waiver of the lien by the acceptance of the guaranty of Trowbridge & Niver Company. (*Dwyer v. Salt Lake City Copper Mfg. Co.*, 14 Utah, 339, 47 Pac. 311; 20 Am. & Eng. Ency. of Law, 496; *Brown v. Williams*, 120

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Pa. St. 24, 6 Am. St. 689, 13 Atl. 519; *Bailey v. Adams*, 14 Wend. 201; *Kankakee Coal Co. v. Crane Bros. Mfg. Co.*, 138 Ill. 207, 27 N. E. 935; *Dutton v. New England Mutual Fire Ins. Co.*, 29 N. H. 153; *Sprague v. Provident Sav. & Trust Co.*, 163 Fed. 449, 90 C. C. A. 71.)

The franchise and rights of a *quasi*-public corporation, owing important duties to the public, and the property vested in it necessary for their use and enjoyment and the accomplishment of the purposes for which it was created, constitute an entirety, and, in the absence of special statutory authority, are not subject to be seized and sold on execution or for mechanics' liens. (*Chicago & N. W. Ry. Co. v. Forest County*, 95 Wis. 80, 70 N. W. 77; *Chapman Valve Mfg. Co. v. Oconto Water Co.*, 89 Wis. 264, 46 Am. St. 830, 60 N. W. 1004; *Plymouth Ry. Co. v. Colwell*, 39 Pa. St. 337, 80 Am. Dec. 526; *Guest v. Merion Water Co.*, 142 Pa. St. 610, 21 Atl. 1001, 12 L. R. A. 324; *Buncombe County Commrs. v. Tommey*, 115 U. S. 122, 5 Sup. Ct. 1186, 29 L. ed. 305; *Pittsburg Testing Lab. v. Milwaukee etc. Light Co.*, 110 Wis. 633, 84 Am. St. 948, 86 N. W. 592; Elliott on Railroads, 2d ed., sec. 1066; Thompson on Corp., 2d ed., sec. 3395; 20 Am. & Eng. Ency. of Law, 2d ed., 296; Phillips on Mechanics' Liens, secs. 180, 181; Boisot on Mechanics' Liens, secs. 188, 209; 3 Dillon, Mun. Corp., 5th ed., sec. 993.)

The terms "buildings, bridges, canals and other structures," used in a mechanic's lien statute, will not be construed to include public buildings, or public bridges, or public canals, or other public structures, or structures, buildings or improvements owned by *quasi*-public corporations and constituting an essential part of the plant or works required by such corporations to accomplish the purposes for which they were created, or to discharge their duties to the public, unless the statute unmistakably shows that such was clearly the intention of the legislature. (Cases cited *supra*, and *Bank of Idaho v. Malheur Co.*, 30 Or. 420, 45 Pac. 781, 33 L. R. A. 141; *Bates v. Santa Barbara Co.*, 90 Cal. 543, 27 Pac. 438; *Loring v. Small*, 50 Iowa, 271, 32 Am. Rep. 136.)

Argument for Respondent.

The findings of fact and conclusions of law constitute the "decision of the court" under our own and similar statutes, and a memorandum of costs served and filed before the signing or filing of such findings and conclusions should be stricken out on motion. (Rev. Codes, secs. 4912, 4406, 4407; *Stewart Min. Co. v. Ontario Min. Co.*, 23 Ida. 724, 734, 736, 132 Pac. 787, 792; *Hamilton v. Spokane etc. Ry. Co.*, 3 Ida. 164, 167, 28 Pac. 408; *Jaldwell v. Wells*, 16 Ida. 459, 462, 101 Pac. 812; *Shurtliff v. Extension Ditch Co.*, 14 Ida. 416, 427, 94 Pac. 574; *Buster v. Fletcher*, 22 Ida. 172, 181, 125 Pac. 226, 229; *Porter v. Hopkins*, 63 Cal. 53; *Mullally v. Irish-American Benefit Society*, 69 Cal. 559, 561, 11 Pac. 215; *Dow v. Ross*, 90 Cal. 562, 27 Pac. 409; *Sellick v. De Carlow*, 95 Cal. 644, 30 Pac. 795; *Smith v. Alford*, 31 Utah, 346, 88 Pac. 16, 18; *McDonnell v. Huffine*, 44 Mont. 411, 120 Pac. 792, 797.)

A. A. Fraser, S. L. Tipton and Robert R. Wedekind, for Respondent.

There was evidence upon which the court based his findings and he did not guess at the quantities and the classification. "The rule that an appellate court will not disturb the findings or decisions of the trial court where there is a substantial conflict in the evidence is applicable to suits in equity as well as in actions of law." (*Stuart v. Hauser*, 9 Ida. 53, 72 Pac. 719.)

"If the party to whom tender is made recovers more than the amount tendered, he is entitled to costs." (*Elder v. Elder*, 43 Kan. 514, 23 Pac. 600; *Rankin v. Newman*, 107 Cal. 602, 607, 40 Pac. 1024, 41 Pac. 304.)

"Tender must be absolute; if made conditional upon giving a receipt in full for all demands it is not good." (*Butler v. Hinckley*, 17 Colo. 523, 30 Pac. 250.)

"The doctrine of laches in the prosecution of an action does not apply where the relative position of the parties has not been materially changed since the time when the cause of action accrued, and the delay has worked no wrong or serious inconvenience to the adverse party, so that substantial justice can still be done between the parties." (*Just v. Idaho*

Argument for Respondent.

Canal & Imp. Co., 16 Ida. 639, 133 Am. St. 140, 102 Pac. 381; *Bergen v. Johnson*, 21 Ida. 619, 123 Pac. 484; *Cole's Admr. v. Ballard*, 78 Va. 139; *Cotrell v. Watkins*, 89 Va. 801, 37 Am. St. 897, 17 S. E. 328, 19 L. R. A. 754; 18 Am. & Eng. Ency. of Law, 2d ed., 99, 101, 111, 119.)

"An action to enforce a lien on real property is *lis pendens* as to a purchaser from a party pending suit or a person taking an encumbrance on a property while the action is pending or any other person acquiring rights during the litigation." (25 Cyc. 1458; *Stout v. Phillippi Mfg. etc. Co.*, 41 W. Va. 339, 56 Am. St. 843, 23 S. E. 571; *Empire Land & C. Co. v. Engley*, 18 Colo. 388, 33 Pac. 153; *Houston v. Timmerman*, 17 Or. 499, 11 Am. St. 848, 21 Pac. 1037, 4 L. R. A. 716; *Andrews v. National Foundry etc. Works*, 76 Fed. 166, 22 C. C. A. 110, 36 L. R. A. 139; *Green v. Rick*, 121 Pa. St. 130, 6 Am. St. 670, 15 Atl. 497, 2 L. R. A. 48; *London & S. F. Bank v. Dexter Horton & Co.*, 126 Fed. 593, 599, 61 C. C. A. 515.)

In order to establish a waiver the intention to waive must clearly appear, and the waiver of a lien will not be presumed or implied contrary to the intention of the party whose rights will be injuriously affected thereby, unless by his conduct the opposite party was misled to his prejudice in the honest belief that such waiver was intended or consented to. (27 Cyc. 262, 264, 274.)

The contention that respondent is not authorized by law to enforce his claim as against this appellant on the theory that it is a *quasi*-public corporation whose property is not subject to a mechanic's lien is contrary to the decision of this court in *Nelson-Bennett Co. v. Twin Falls L. & W. Co.*, 14 Ida. 5, 93 Pac. 789.

The wording of sec. 4912, Rev. Codes, requiring the memorandum of costs to be filed within five days after notice of decision, contemplates a notice to the successful party by the unsuccessful, other than the mere filing of findings and conclusions. (*Stickney v. Berry*, 7 Ida. 303, 62 Pac. 924.)

If notice to counsel is necessary other than the filing of the findings of fact and conclusions of law, recovery of costs in all cases tried by the court without a jury would be a hazard-

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ous and doubtful thing. The court may make its own findings and conclusions, sign and file the same with the clerk unbeknown to counsel who has prevailed in the suit, or he may amend and hold the findings and conclusions submitted by counsel for a considerable time before signing and filing the same, and if counsel reside out of the district, or, it may be, without the state, he could never recover his costs unless the clerk, the court or opposing counsel gave him notice of the signing and filing of the findings of fact and conclusions of law. (*Dow v. Ross*, 90 Cal. 562, 27 Pac. 409; *Spoor v. Board of Supervisors of Riverside County*, 113 Fed. 26; *O'Neil v. Donahue*, 57 Cal. 226.)

It is clearly established that in all cases tried by the court without a jury, where the record does not show a decision of the court, as defined in *Stewart Min. Co. v. Ontario Min. Co.*, 23 Ida. 724, 132 Pac. 787, a notice of such decision to the successful party is an essential and necessary prerequisite before the unsuccessful party can claim a forfeiture of such costs. The record in this case does not show that respondent ever had knowledge of the "decision of the court," and such presumption may not be indulged in the absence of such showing.

MORGAN, J.—This action was commenced to foreclose a mechanic's lien claimed by the respondent against the main ditch and canal of the Canyon Canal Company, Limited, for work and labor done and performed by respondent as a subcontractor in the construction thereof. The appellant, Faris-Kesl Construction Company, was the original contractor and was made a defendant with a view to obtaining a personal judgment against it.

Subsequent to the commencement of the action and prior to the trial in the district court, the appellant, Emmett Irrigation District, became the successor in interest to the said Canyon Canal Company and was substituted for it as a defendant.

It is alleged in the complaint that the amount of excavating, grading, filling and clearing of land done and completed

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by respondent under said contract was as follows: Embankment, 15,118 cubic yards; earth excavation, 37,450 cubic yards; gravel excavation, 5,670 cubic yards; loose rock excavation, 41,361 cubic yards; solid rock excavation, 35,959 cubic yards; clearing of sage-brush, 25.09 acres. That the amount of the contract price for such labor was \$48,198.38, and that no part thereof has been paid except \$30,641.87, and that there is now due under the terms of said contract the sum of \$17,581.51, in which amount, together with interest thereon, costs and attorneys' fees, the respondent asked for judgment; also that the lien be foreclosed and the canal be sold to satisfy said judgment.

The appellant construction company in its amended answer admitted the execution of the contract and denied, among other things, that the excavating or grading or filling or clearing of land done or completed under said contract were in the amounts alleged in the complaint or were in any other amount or amounts than as follows: Embankment, 15,118 cubic yards; earth excavation, 65,479 cubic yards; gravel excavation, 6,352 cubic yards; loose rock excavation, 24,468 cubic yards; solid rock excavation, 23,361 cubic yards; clearing of sage-brush, 29.95 acres; force account, \$15.00. Said appellant also denied that the amount of the contract price for said labor performed by respondent under said contract was \$48,198.38, or any other amount or sum other than the sum of \$36,037.82, and denied that the amount paid to respondent was the sum of \$30,641.87, and alleged the fact to be that said appellant had paid to said respondent the sum of \$33,856.26, and denied that there was due or owing to the respondent under said contract the sum of \$17,581.51 or any other sum or amount or at all except the sum of \$5,386.02. Upon the trial of this cause in the district court the parties stipulated that the appellant construction company, had paid to the respondent, upon the contract and for work performed by him thereunder, the sum of \$30,720.25.

A number of other issues were presented by said complaint and amended answer and the appellant, Emmett Irrigation District, also answered, adopting the allegations of the appel-

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lant construction company heretofore referred to, except as to the ownership of the property, and presenting additional issues which will, in so far as necessary to a determination of the questions presented by this appeal, be hereinafter discussed.

The trial court found the amount of excavating, grading, filling and clearing of land done and completed by respondent under said contract to be as follows:

Clearing of sage-brush, 29.95 acres.....\$	119.80
Embankment, 15,118 yards at 11¢ per yard	
.....	1,662.98
Earth excavation, 51,056 yards at 11¢ per yard	
.....	5,616.16
Gravel excavation, 5,931 yards at 15¢ per yard	
.....	889.65
Loose rock excavation, 32,687 yards at 35¢ per yard	
.....	11,440.45
Solid rock excavation, 29,986 yards at 75¢ per yard	
.....	22,489.50

That respondent was entitled to receive under the terms of said contract the sum of \$42,218.54; that he had received \$30,720.25 thereof, and that there was a balance due and unpaid thereon of \$11,498.29, together with interest thereon at the rate of 7% per annum, which interest up to April 9, 1913, amounted to \$5,231.72. The trial court also found \$900 to be a reasonable amount to be allowed to respondent as attorneys' fees for the foreclosure of the lien, and, as a conclusion of law, found that respondent was entitled to recover from Faris-Kesel Construction Company said sums of money; also that respondent was entitled to a lien upon the property described in his complaint for the sum of \$17,630, and that he was entitled to a decree foreclosing the same. Said lien to be subject and subordinate only to the lien of the first mortgage bonds in the amount of \$350,000, secured by a trust deed executed by Canyon Canal Company to the American Trust & Savings Bank, dated June 15, 1905, and that if any deficiency should arise upon the sale the respondent should have a judgment against Faris-Kesel Construction Company for the

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amount of such deficiency. Judgment and decree were entered in accordance with the findings of fact and conclusions of law, from which judgment and decree appeals have been taken by Faris-Kesl Construction Company and Emmett Irrigation District. An appeal was also taken by said appellants from an order denying their motion to strike from the files respondent's memorandum of costs and disbursements in said case. All of said appeals were heard together.

It will be observed that no great difference exists between the parties as to the amount of material handled by respondent in the construction of said canal, but that one of the principal differences between them grows out of the classification of the materials so handled. The evidence consisted of the testimony of a number of expert witnesses who gave the results of their estimates of the amount of earth, gravel, loose rock and solid rock removed. There is a broad discrepancy between the testimony of the witnesses for the appellants and those for the respondent upon this point, and the trial court did not adopt the estimates of either of them, but found, with respect to each class of material, more than estimated by the witnesses for one party and less than estimated by those for the other. This is assigned as error by the appellant, Faris-Kesl Construction Company, and it is urged that the findings of the trial court were arbitrary, that no witness testified to such amounts, and that the court should have adopted the estimates of some of the witnesses as to the classification.

Certain cases were cited in support of this contention by said appellant, but they do not appear to be in point, in that in each of the cases cited the facts are susceptible of definite proof, while in this case the proof upon this point consists entirely of the testimony of expert witnesses to their estimates and the results thereof. It cannot be claimed for this class of testimony that it is accurate; the most that can be said for it is that it is approximate, and this is the best evidence of which a case of this nature is susceptible, for the classification of the different kinds of material removed from

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a canal may be, and in this case was, the subject of difference of opinion between expert witnesses. Certainly a trial court cannot be required to be more accurate in its findings than the nature of the case permits the evidence to be. While the evidence is conflicting upon this point and no part of it has been adopted by the court as against any other part, as a whole it supports the findings. It was the duty of the court to consider the evidence as a whole, and we are unable to say that an injustice has been done to any of the parties by the findings complained of.

As above indicated, decisions in cases involving questions by their nature susceptible of definite proof differ materially from a case of this kind which, by its nature, presents a question the decision of which is dependent upon expert or opinion testimony adduced from a number of witnesses differing in their estimates and opinions.

It is the settled law of this state that an appellate court will not disturb the findings or judgment of the trial court where there is a substantial conflict of the evidence. This rule applies with equal force in actions at law and suits in equity, where a trial is had on oral evidence. (*Stuart v. Hauser*, 9 Ida. 53, 72 Pac. 719; *Pine v. Callahan*, 8 Ida. 684, 71 Pac. 473; *Commercial Bank v. Lieuallen*, 5 Ida. 47, 46 Pac. 1020; *Sabin v. Burke*, 4 Ida. 28, 37 Pac. 352; *Spaulding v. Coeur d'Alene Ry. & Nav. Co.*, 5 Ida. 528, 51 Pac. 408.)

In this case there is a substantial conflict in the evidence as to the proper classification of the materials removed in the construction of the canal, and this court finds no error in the decision of the trial court in so far as it fixes the amount and classification of the materials so removed by the respondent.

Said appellant insists that since the respondent accepted certain payments on monthly estimates made as the work progressed, by so doing he waived all objections to the estimates so made and, by receiving ninety per cent of the amount due as shown by said estimates, it amounted to an accord and satisfaction of all except the ten per cent retained under the terms of the contract. This contention makes necessary a con-

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sideration of the second paragraph of said contract, which is as follows:

"Second. That for and in consideration of the faithful performance of each and every covenant and agreement herein contained, to be kept and performed by the party of the first part, the party of the second part hereby contracts and agrees to pay to the party of the first part, his heirs, executors or administrators, the following schedule of prices, to wit:

"For earth excavation or embankment. .\$.11 per cu. yd.

"For gravel excavation or embankment. .15 per cu. yd.

"For loose rock excavation..... .35 per cu. yd.

"For solid rock excavation..... .75 per cu. yd.

"For clearing sage-brush..... 4.00 per acre.

"Payments to be made as follows: Approximate of estimates of the amount of work done during each month, will be taken by the engineer of the Canyon Canal Company, Ltd., in charge of the work, on or about the last day of each month during the progress of the work and the amount of such estimate less ten per cent (10%) shall be made to the party of the first part on or before the 20th day of the following month; the reserved percentage (10%) to be withheld and retained by the party of the second part until the work is completed and accepted by the engineer of the said Canyon Canal Company, Ltd. The percentage retained, as above, together with the balance due on the final estimate will be paid to the party of the first part, within thirty (30) days after the work is completed and accepted by the chief engineer of the Canyon Canal Company, Ltd., as hereinabove provided, and the presentation of satisfactory evidence that all bills for labor and material and all other claims that are or might become liens against the property of the said Canyon Canal Company, Ltd., are fully paid and satisfied."

The receipt by respondent of partial payments based upon the approximate estimates mentioned in the contract cannot be deemed to be a waiver of his right to question the final estimate, and to do so would be to find that the parties had agreed that estimates which purport to be only approximately correct are absolutely correct. A careful examination of the

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contract does not disclose that they so agreed. Since the payments to be made upon the estimates were partial payments and the estimates themselves but approximate estimates, the clause in the contract referring to them does not bind the parties to the final estimate nor provide that these approximate estimates shall be considered either accurate or binding to any other or greater extent than as fixing the amounts to be paid upon the contract as partial payments. To this extent the contract did bind the respondent, and therefore, by accepting the payments thereby found to be due, he did not waive his right to question the final estimate or to demand payment according to the schedule fixed by the contract.

Counsel for appellant construction company has cited a great many authorities in support of the contention that in the absence of evidence of fraud or mistake, or such undue influence or collusion as amounts to fraud in making the estimates of the amount of work performed under the contract, the parties thereto are bound by such estimates. These cases have all been carefully examined by the court and are found to correctly state the rule in case the contract provides that an engineer or architect shall be the umpire or final arbitrator between the parties whenever any disagreement arises or misunderstanding exists between them growing out of the contract. As an example of this class of cases, that of *Hot Springs Ry. Co. v. Maher*, 48 Ark. 522, 3 S. W. 639, cited on behalf of said appellant, is selected. In that case it was provided in the contract, among other things: "It is mutually agreed by and between the parties hereunto that all questions relating to quantity, quality or manner of construction of said above stipulated work shall be decided by the engineer in charge of said work, and his decision shall be final and conclusive on all matters pertaining to this contract." By comparing said provisions to the contract here under consideration the distinction will be readily observed and cannot well be pointed out more clearly than is done in the case of *Memphis etc. Ry. Co. v. Wilcox*, 48 Pa. St. 161, also cited in behalf of said appellant, wherein it is said: "The first and second assignments of error present the same question; and

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that is, whether the estimates of the chief engineer are to be considered conclusive, precluding all other testimony on the same subject matter, unless fraud or bad faith be shown on his part. The cases of the *Monongahela Navigation Co. v. Fenlon*, 4 Watts & S. (Pa.) 205, and succeeding cases, amongst which are *Faunce v. Burke & Gonder*, 16 Pa. St. 469, 55 Am. Dec. 519, *Snodgrass v. Gavit*, 28 Pa. St. 221, *Lauman v. Young*, 31 Pa. St. 306, and *McGrann v. North Lebanon R. R. Co.*, 29 Pa. St. 82, in which the estimates and decisions of the company's engineers, in case of disputes between the contractors and the company, were held to be conclusive, all rest on a positive stipulation in the contract to that effect; and even the validity of the express stipulation was hotly contested in the first mentioned case, because it was urged that it was a provision by which the company was enabled to choose its own judge, and one that was directly interested, to sustain their quarrel. To this it was answered that such an objection was waived by the stipulation, and that it was even competent for a contractor to agree to the arbitrament of an interested party, if he chose; and when, with full knowledge he did so, he must abide the result. The subsequent cases were all ruled by the decision of this case.

"In this contract, however, this stipulation for finality is wanting, and this makes a most material difference. It provides for monthly estimates, and in the end for a final estimate by the engineer, without any declaration as to conclusiveness. His estimates and acts have no quality, therefore, of an adjudication. It must depend for finality on its inherent accuracy, and to test whether it be accurate or not, it is liable to be met by any competent proof, which would disclose its errors and mistakes, if there be any."

In the contract here under consideration it was not stipulated that the estimates of the engineer should be final, binding or conclusive upon the parties; therefore the allegations of fraud in the complaint were immaterial and the estimates of the engineer were subject to attack for inaccuracy, and it was proper for the trial court to consider all the evidence offered and admitted touching the amount, character and

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classification of material handled by respondent in the construction of the canal. It appears that the trial court did this, and we find no error in the conclusion reached as to the principal sum due under the contract.

This conclusion disposes of the contention of said appellant relative to its tender of \$8,968.23 to respondent, which tender was rejected. Since that is less than the amount found to be due upon the contract, and since said amount was tendered, not as a partial payment, but as settlement in full, it did not estop the accumulation of interest upon any part of the debt.

The second point urged by appellant construction company is based upon its fourth assignment of error, and is to the effect that since the lien was not being foreclosed against its property no judgment for attorneys' fees should have been allowed against it. In support of this contention counsel for said appellant cites a number of authorities to the effect that where plaintiff fails to establish his lien, he cannot recover attorneys' fees. Undoubtedly this is the law, but it is beside the point in controversy. In this case the plaintiff did establish his lien. Sec. 5121, Rev. Codes, is as follows:

"Any number of persons claiming liens against the same property may join in the same action, and when separate actions are commenced the court may consolidate them. The court shall also allow as part of the costs the moneys paid for filing and recording the claim, and reasonable attorney's fees."

This court had under consideration said sec. 5121, Rev. Codes, in case of *Shaw v. Johnston et al.*, 17 Ida. 676, 107 Pac. 399, and while the contention here made was not presented in that case, the following quotation from it may be of value as tending to show that the attorney's fee is merged with and becomes a part of the principal debt for which foreclosure of the lien is sought:

"Under the provisions of said sec. 5121, the attorneys' fees are not a part of the costs, and therefore the fact that the plaintiff in the lower court recovered less than the sum of \$100 is immaterial so far as attorneys' fees are concerned,

as attorneys' fees are recoverable even though the amount of the judgment is less than \$100. The attorneys' fees are a lien upon the property. (*Peckham v. Fox*, 1 Cal. App. 307, 82 Pac. 91.) In that case it was held that if a plaintiff recover in a suit to foreclose a mechanic's lien, that provision of sec. 1195, providing for an attorney's fee should be construed as entitling plaintiff to such fee as a part of the recovery, and therefore conferred a lien for the attorney's fee as well as for the subject matter of the action."

It is said in a footnote appearing in Cyc., vol. 27, page 463: "The attorney's fees are not strictly costs but are incidental to the lien of the judgment to which the successful lienor is entitled as a part of the recovery and for which the lien is enforced as for the principal debt."

In case of *Rapp v. Spring Valley Gold Co.*, 74 Cal. 532, 16 Pac. 325, it is said:

"The first position of the appellants is that the stipulation waived the attorney's fee. The material portion of the stipulation is as follows: 'Plaintiffs shall reduce their claims to judgment in the following manner: Said Gregory, in conjunction with Mr. N. S. Walker, Jr., vice-president of the company, shall immediately, or as soon as they can, ascertain and fix the amount due to each of the plaintiffs in said suit, and upon such ascertainment, judgment shall accordingly be entered in said suit for the foreclosure of the merchant's liens sued on.' The argument for the appellants upon this language is that the provision is that judgment should be entered for the amount due to the plaintiffs, and, by implication, for nothing else, and that the attorney's fee was not a part of the amount due to the plaintiffs. This argument proves too much. It would exclude a judgment for costs, as well as for attorney's fees. Costs are not a part of the amount due to the plaintiffs, but it is not disputed by appellants that the judgment for costs was proper. The attorney's fee in this kind of case is not, strictly speaking, part of the costs. If allowed by the court, it need not be placed in the memorandum of costs. But it was properly allowed, for the same reason that costs were allowed, viz., that it was a neces-

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sary incident of the judgment stipulated for, and was not expressly, or by necessary implication, excluded by the stipulation. That the attorney's fee in foreclosure is merely an incident of the judgment, and not an element of the cause of action, was held in *Carriere v. Minturn*, 5 Cal. 435. In that case Heydenfeldt, J., delivering the opinion, said: 'The counsel fees stipulated to be paid were not the cause of action, but, like the costs, a mere incident to it, and may be fixed by the chancellor at his discretion, not exceeding the amount stipulated.' And this case was approved and followed in *Monroe v. Fohl*, 72 Cal. 568, 14 Pac. 515, 516. If the attorney's fee was an incident to the judgment stipulated for, it was properly allowed by the court, unless excluded by the stipulation, which, as above stated, we do not think was the case."

While said appellant construction company does not own the property against which the lien is sought to be foreclosed, it owes the money sued for, and it is by reason of its failure to pay its debt that the expense of employing respondent's attorneys was incurred. It was made a party defendant and a judgment was procured against it and, as indicated in the foregoing authorities, the attorney's fee is an incident to the judgment.

It has been held, and properly, too, that where the owner of property has been forced to pay attorneys' fees to a successful lien claimant, he can recover back the amount from the contractor who owed the debt for which the lien was foreclosed. (*Covell v. Washburn*, 91 Cal. 560, 27 Pac. 859; *Clancy v. Plover*, 107 Cal. 272, 40 Pac. 394.)

Since the appellant construction company contracted and still owes the debt to secure which the lien was filed and to recover which the foreclosure is sought, and since, together with the owner, it is a party against whom judgment was awarded of which the attorney's fee is an incident and part, and since said appellant is liable for the payment of the attorney's fee, even as between itself and its codefendant, it cannot be successfully urged that this portion of the judgment must first be taken against and collected from its co-

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defendant and then recovered from said appellant construction company in a separate action wherein its codefendant is plaintiff and it is defendant. One of the commendable principles of equity is that it does not encourage a multiplicity of suits.

The appellant Emmett Irrigation District presents a number of assignments of error in addition to those relied upon by the appellant construction company, among them being "that there was no evidence to justify or sustain the finding that plaintiff was not guilty of laches in prosecuting his suit." The complaint in this case was filed on May 6, 1907, and the original answer of the construction company on September 16th of the same year. An amended answer was filed by said construction company, which by oversight does not appear in the transcript, and the copy supplied to the record does not show the date of filing, but it appears to have been verified on January 11, 1912. On February 7, 1912, on motion of counsel for the defendants, the said appellant, Emmett Irrigation District, was substituted as a defendant for the Canyon Canal Company, Limited. It answered on February 8th and the case was set for trial on February 9, 1912, upon which date the trial of the case was commenced, and it seems to have been prosecuted without undue interruption until its conclusion. While the clerk's minutes show that between the date of filing the original answer of appellant construction company and the date of the beginning of the trial the case was repeatedly set for hearing and was stricken from the calendar or continued for the term, it does not appear that these delays were due to any fault on the part of the respondent nor that they met with any opposition upon the part of anyone else, neither does it appear that it was ever the intention of respondent to abandon his claim of lien; furthermore, the trial commenced on the next day after said appellant irrigation district answered, and its codefendant the construction company makes no complaint of the delay which had occurred prior to that time. No motion was made to dismiss the case for failure to prosecute, and the trial court found that as a fact "that the plaintiff was not guilty of

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laches in prosecuting his suit; that the complaint was filed and an appearance of the defendants made in due time, and that Emmett Irrigation District took over the Canyon canal with full knowledge of the plaintiff's claim and has not been damaged or injured by the delay of plaintiff in prosecuting his action." The issue as to whether or not the respondent was guilty of laches was presented by the answer of the appellant irrigation district, and we find nothing in the record to sustain its allegations in that behalf.

After stating the rule "that independent of any statute of limitation, courts of equity uniformly decline to assist a person who has slept upon his rights and shows no excuse for his laches in asserting them," this court in the case of *Just v. Idaho Canal etc. Co.*, 16 Ida. 639, 133 Am. St. 140, 102 Pac. 381, said: "There is no doubt but that the rule contended for by appellants is the general rule adopted in courts of equity. It has been recognized and followed in this court. (*Idaho G. M. Co. v. Union Min. etc. Co.*, 5 Ida. 107, 121, 47 Pac. 95; *Ryan v. Woodin*, 9 Ida. 525, 75 Pac. 261.) As we understand the rule, however, it has this exception, that it is not invoked or applied by the courts in cases where it manifestly appears that its application is not essential in order to protect the adverse party from being placed in a worse condition by reason of the delay than he would have been in had the action been prosecuted with greater diligence."

In case of *Bergen v. Johnson*, 21 Ida. 619, 123 Pac. 484, the court in the syllabus said: "Where laches is plead as a defense, the facts and circumstances of each case must govern the court in determining the sufficiency of the laches to constitute a defense to the cause of action. Lapse of time may be considered as an important element, but is not controlling, and the court should give proper and due regard to the surrounding circumstances and the acts of the parties and their relationship to the property involved in the controversy."

Lapse of time alone is not sufficient to justify a dismissal of the action. In cases of this kind, when a defense of laches is sustained it is upon the theory that the delay, taken with other circumstances in the case, is satisfactory evidence that

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the cause of action has been abandoned, or that it resulted in injury to someone not responsible for the delay, and where this theory, or presumption, is overcome by other facts and circumstances, the defense should not prevail.

Laches has been defined in 18 Am. & Eng. Ency. Law, 2d ed., 97, as follows: "Laches is such neglect or omission to assert a right as, taken in conjunction with the lapse of time more or less great, and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity."

A part of the syllabus in case of *Coles v. Ballard*, 78 Va. 139, is as follows:

"Laches is the neglect to do something which a party ought to do, and a mere lapse of time, unaccompanied by some circumstance affording evidence of a presumption that the right has been abandoned, is not considered laches."

In this case the finding of the trial court that the plaintiff had not been guilty of laches is not error and will not be disturbed.

Said appellant irrigation district further contends that "in order to charge purchasers with notice of the pendency of an action it must be diligently prosecuted, and in addition under our statute notice of *lis pendens* must be filed where the suit affects real property." It is true that sec. 4142, Rev. Codes, provides for the filing of *lis pendens* in actions affecting the title to or right of possession of real property, but this is necessary only for the purpose of giving record notice to subsequent purchasers or encumbrancers of the property who have not actual knowledge of the action or of the claim upon which it is based. In this case the trial court found that the Emmett Irrigation District took over the canal with full knowledge of the respondent's claim, and the record amply justifies such finding, so the contention of the said appellant that in this case the filing of a *lis pendens* was necessary to give it notice cannot be sustained.

It appears that the Canyon Canal Company, Limited, the original builder and owner of the canal, made and executed a mortgage or trust deed upon said property to the American

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Trust & Savings Bank, as trustee, to secure the payment of certain first mortgage bonds in an amount not to exceed \$350,000, and it further appears that Faris-Kesel Construction Company, in order that said mortgage or trust deed might be a first lien upon said property, entered into a contract in writing, the part of which material to be considered in this case is as follows:

"Now, therefore, in consideration of the premises and the sum of one dollar and other valuable considerations received by the Faris-Kesel Construction Company, Limited, from the parties interested in having said mortgage constitute a first lien on said canal system, has and hereby does waive and release on behalf of itself and its successors, assigns and subcontractors all lien or right of lien for work done or to be done or material furnished or to be furnished, in the construction of any part of the canal system of said the Canyon Canal Company, Limited, superior to said trust deed or mortgage upon the said canal system of the Canyon Canal Company, Limited, meaning and intending hereby to make and constitute the said trust deed a first and paramount lien for the security of said bonds upon all the property of the Canyon Canal Company, Limited, aforesaid."

The eighth paragraph in the contract made and entered into by and between the respondent and the appellant construction company, under which the work was performed for which the claim of lien was made, is as follows:

"Eighth. The party of the first part further agrees to and does hereby waive any lien on the property of the Canyon Canal Company, Ltd., as the Faris-Kesel Construction Company has waived its lien in favor of the holders of the first mortgage bonds under the trust deed issued by said Canal Co., and accepted instead thereof, the obligation of Trowbridge Niver and Co., the purchaser of said bonds to pay the contractor directly from the proceeds of the sale of said bonds."

It is urged by the appellant irrigation district that by the eighth paragraph in his contract, above quoted, the respond-

ent waived his entire lien and not merely such priority as he might have had over the mortgage.

It is entirely apparent from the language in said paragraph 8th of the contract between respondent and the appellant construction company that it was the intention of the parties that the respondent should and did waive his lien in the same manner, and to the same extent, said construction company had waived its lien, and not otherwise. "What constitutes a waiver is essentially a question of intention. . . . In order to establish a waiver the intention to waive must clearly appear, and a waiver of the lien will not be presumed or implied contrary to the intention of the party whose rights would be injuriously affected thereby unless by his conduct the opposite party was misled to his prejudice into the honest belief that such waiver was intended or consented to." (27 Cyc. 262.)

From the language of the waiver the appellants were not justified in a belief that any intention existed upon the part of the respondent to waive his lien, except in so far as to make it subsequent to the mortgage above mentioned, and there is no error in the finding of the trial court to the effect that the respondent did not waive his lien on said Canyon canal for the work and labor performed thereon under the terms of his contract, but did by contract waive the priority of his lien to the \$350,000 mortgage made by said Canyon Canal Company in favor of the American Trust & Savings Bank, as trustee.

The appellant irrigation district assigns as error the action of the court in not finding and deciding that in the event the said appellant had, in order to protect its property and irrigation system, paid off and discharged the lien of said \$350,000 mortgage, or any portion thereof, that said appellant should be subrogated to the rights and priorities of the beneficiaries under said mortgage.

Counsel for said appellant have cited a great number of authorities and have devoted a large portion of their brief of argument to this contention. The idea of subrogation appears to be an afterthought which has occurred to the said

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appellant, or its counsel, since the trial or, at the earliest, since its answer was filed, as there is no allegation in any of the pleadings to support such a finding had the court made it. That facts must be alleged upon which the claim to the right of subrogation is based is a rule so elementary and universal that no authorities need be cited to support it.

The said appellant irrigation district assigns as error the action of the court in deciding that the right, title and interest of the Canyon Canal Company, Limited, or of its successor, the said appellant, could be subject to a mechanic's lien. Said appellant earnestly urges that works of a public character are not subject to the mechanic's lien law unless the statute shows clearly an intention on the part of the legislature to include such works. The section of the statute granting a right to a mechanic's lien is 5110, Rev. Codes, and the part necessary to be considered in this connection is as follows:

"Every person performing labor upon, or furnishing materials to be used in the construction, alteration or repair of, any mining claim, building, wharf, bridge, ditch, dike, flume, tunnel, fence, machinery, railroad, wagon road, aqueduct to create hydraulic power, or any other structure, or who performs labor in any mine or mining claim, has a lien upon the same for the work or labor done or materials furnished, whether done or furnished at the instance of the owner of the building or other improvement or his agent. . . . "

Such act is a part of title 4 of the Rev. Codes, and we are admonished by the legislature in sec. 5150, which is also a part of said title 4, as follows:

"This title establishes the law of this state, respecting the subject to which it relates, and its provisions and all proceedings under it are to be liberally construed with a view to effect their object."

This question was before the court in case of *Nelson Bennett Co. v. Twin Falls Land & Water Co.*, 14 Ida. 5, 93 Pac. 789, and while it is contended by counsel for the appellant that the questions here presented were not discussed by counsel or considered by the court in said case, an examination

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of the opinion of the court in that case indicates to the contrary, for therein it is said:

“An examination into the character and extent of the appellants’ interest in this property and these works is at once suggested by reason of the contention that it makes to the effect that a mechanic’s lien cannot be maintained against this property. The Land & Water Company has argued with much force and earnestness that it has no lienable interest in this property; that the entire property belongs to the state of Idaho and to the United States—that the canal system and the water and the entire works belong to the state of Idaho, and that the lands to be irrigated principally belong to the United States. Appellants contend that the only interest they have is that they may do this work and receive their pay, and that the law does not permit a lien either against the state or the general government.”

After discussing the laws pertaining to construction companies of the kind under consideration and the rights of such companies and their interests in and to canals and water systems by them constructed, and after considering at some length the contract entered into between said Twin Falls Land & Water Company and the state of Idaho, the court said:

“The foregoing are some of the numerous rights and interests we find provided and stipulated for in the contract entered into between the appellant corporation and the state. As to the legal effects of these various stipulations and provisions and the extent of the rights, title and interest acquired by the appellant corporation under them, we express no opinion, nor are we required in this case to determine whether they are sufficient on which to found or rest a mechanic’s lien. That the Twin Falls Land & Water Company had, and still has, an interest in this canal system and the lands thereunder and the waters appropriated for their irrigation and reclamation, and that under the statutes and decisions of this state such property rights are real estate, there can be no doubt. . . . In this case there is no contention made that the lien claimant can acquire any greater right or interest

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under its lien than that owned and possessed by the Twin Falls Land & Water Company. . . . Under this enactment of the state legislature, it is clear to us that the contractors and subcontractors under a construction company like the appellant would be entitled to avail themselves of the benefit of the lien laws of the state, and that in case of foreclosure and sale under the lien they would be entitled to sell all the right, interest and claim of the construction company, and that the purchaser at such foreclosure sale would be subrogated to all the rights, interests and privileges of the construction company therein. . . . This lien extends only to the interest, claim and right of the Twin Falls Land & Water Company."

In this case the lien extends only to such right, title and interest as the Canyon Canal Company, Limited, had in the property at the time the lien of the respondent attached to it, subject to the lien, if any, now existing and to the extent that the same does exist, of that certain mortgage made and executed by the said Canyon Canal Company to the American Trust & Savings Bank, as trustee, for the purpose of securing the payment of bonds of said canal company in the sum of \$350,000.

Our attention has been directed to the case of *Childs v. Neitzel*, 26 Ida. 116, 141 Pac. 77, wherein it is said: "Construction companies of this kind will not be permitted to do indirectly what they are prohibited from doing directly. They will not be permitted to make contracts with third parties in regard to the construction or completion of an irrigation system whereby the land owners or purchasers of water rights can be deprived of the rights acquired under their water right contracts. For instance, if a company, such as the Murphy company, fails to complete its system and furnish the water as provided in the water right contracts, or if such company should sublet the construction of its system and fail and neglect to pay such subcontractor, the subcontractor would not acquire greater rights as against the water right purchasers than the irrigation company itself had under its contract with the purchasers of water rights, and could

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not deprive the purchasers of water rights under such system of their rights, or acquire a right by foreclosure of a lien or mortgage for such construction work as would deprive the water right purchasers of their rights under their contracts."

There appears to be no discord between that opinion and that in case of *Bennett v. Twin Falls Land & Water Company, supra*, upon the point under consideration, and it is not the intention to express anything herein from which it may be inferred that a purchaser at a sale of property to satisfy a mechanic's lien can acquire any greater right, title or interest in or to the property than the owner had at whose instance the improvement was made.

On April 9, 1913, the trial judge addressed a letter to counsel for the respective parties indicating that the judgment would be in favor of the respondent, and the amount thereof. On the 14th of said month counsel for the respondent served upon counsel for the appellants, and filed, a memorandum of costs and disbursements amounting to \$421.50. The findings of fact, conclusions of law and judgment were made and entered on April 21, 1913, and thereafter no memorandum of costs and disbursements was filed. On May 15, 1913, counsel for appellants served notice of motion to strike said memorandum of costs and disbursements from the files for the reason that the same had been prematurely filed. Thereafter the motion was submitted to the court and denied. Both appellants have appealed from the order denying said motion.

The right to recover costs is statutory and the prevailing party cannot recover his costs unless he conforms to the provisions of the statute. The law of Idaho upon this subject is to be found in sec. 4912, Rev. Codes, and the part thereof necessary to be considered here is as follows:

"The party in whose favor the judgment is rendered and who claims his costs, must, within five days after the verdict or notice of the decision of the court or referee, file with the clerk, and serve upon the adverse party or his attorney, a copy of a memorandum of the items of his costs and necessary disbursements in the action or proceeding. . . ."

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The question of law presented for determination is as to the meaning of the words "decision of the court" as used in said section of the codes. Sec. 4407, Rev. Codes, is as follows: "In giving the decision, the facts found and the conclusions of law must be separately stated. Judgment upon the decision must be entered accordingly."

In the case of *Stewart Min. Co. v. Ontario Min. Co.*, 23 Ida. 724, 129 Pac. 932, this court, in the first section of the syllabus, said:

"Under the statute of this state, sec. 4406, Rev. Codes, the decision of the trial court consists of the findings of fact and conclusions of law which must be in writing and filed with the clerk. An oral opinion announced by the court from the bench prior to making of findings of fact and conclusions of law, or a written opinion addressed to counsel which is not in the nature of findings and conclusions, is not the decision of the court, and exceptions taken thereto and assignments of error directed against such an opinion are not assignments against the decision of the court, and will not call for a review thereon on appeal."

See *Porter v. Hopkins*, 63 Cal. 53; *Sellick v. De Carlow*, 95 Cal. 644, 30 Pac. 795; *McDonnell v. Huffine*, 44 Mont. 411, 120 Pac. 792. We conclude that the letter addressed to counsel for the parties litigant is not "notice of the decision of the court" as contemplated by said sec. 4912, Rev. Codes, and that the memorandum of costs and disbursements was, therefore, prematurely filed.

Respondent contends that the phrase "notice of decision" contemplates a notice to the successful party by the party unsuccessful other than the mere filing of said findings and conclusions, and that if the letter from the court is not such notice, respondent has never yet had "notice of the decision of the court," and that it is not now in default for failure to file a memorandum of costs and disbursements as provided by said sec. 4912. The question of whether or not the respondent is in default in this behalf is not properly before this court for determination. The question presented by this appeal is, "was the memorandum of costs and dis-

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bursements prematurely filed?" We have answered that question in the affirmative.

The order of the court denying the motion to strike the said memorandum of costs and disbursements from the files is reversed, with instructions that the judgment be modified accordingly. No costs upon appeal will be allowed.

Budge, J., and District Judge Bryan concur.

Sullivan, C. J., did not sit at the hearing of this case and took no part in the decision.

(July 8, 1915.)

ON REHEARING.

BUDGE, J.—Petitions for rehearing were filed on behalf of each of the appellants in the above-entitled cause. After a careful examination of the petitions and the authorities therein cited this court concluded to submit to counsel for the respective parties the following questions, and grant a rehearing thereon:

(1) Whether or not this court should determine, under the pleadings and evidence in this case, the nature, character and extent of the lien in favor of J. W. Smith, respondent, against the Emmett Irrigation District, more definitely than has been done in the opinion heretofore filed.

(2) Whether or not the Emmett Irrigation District is entitled to be subrogated to the rights of the holders of first mortgage bonds, viz., the \$350,000 issue authorized by the Canyon Canal Company, and to what extent.

(3) Whether or not the item of \$900 attorney fee is a lien against the property of the Faris-Kesl Construction Company.

So far as the first question that was submitted for argument is concerned, this court, in order to go beyond the original opinion and determine more definitely the nature, character and extent of the lien in favor of respondent Smith

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against the Emmett Irrigation District, would necessarily be required to go outside the record and the issues made by the pleadings and anticipate certain litigation which may arise between persons not parties to this action to determine their interests and the extent to which the property of the Emmett Irrigation District will be subject, under the litigation, to the payment of the debt due to the respondent Smith. If these matters were properly before us, we would gladly dispose of them in order to avoid further litigation. These interests, no doubt, will be finally determined at the proper time and upon issues properly framed and supported by proof.

The second question may be disposed of by merely directing attention to the failure of the appellant Emmett Irrigation District to allege or establish, by evidence or otherwise, any fact or facts which would justify this court in applying the doctrine of subrogation in favor of appellant in this proceeding.

To the third and last question, the item of attorney fee, there is nothing further that can be added than is found in the original opinion which, in our judgment, is clearly decisive of that question.

We have reached the conclusion that the foregoing questions, as well as all other questions involved in the petitions for rehearing, and which were presented to the court upon reargument, were correctly decided in the original opinion in this case, which is accordingly reaffirmed.

Morgan, J., and Bryan, District Judge, concur.

Argument for Appellant.

(June 1, 1915.)

D. E. HALL, Appellant, v. WASHINGTON WATER POWER CO., a Corporation, Respondent.

[149 Pac. 507.]

DAMAGES—FLOODING LAND—EVIDENCE—NONSUIT.

1. Where it was alleged that the plaintiff had been damaged by reason of the construction of certain dams in the Spokane river, and it was alleged that the plaintiff's lands were flooded by reason of said dams having raised the water level of Lake Coeur d'Alene and the creek on which his land was located, it was necessary for him to prove that such dams had raised the water level and caused the injury to his land.

2. Held, that the evidence was not sufficient to prove that the plaintiff's land was injured by reason of the maintenance of said dams.

3. Where the evidence is not sufficient to support a verdict for the plaintiff, the trial court does not err in granting a motion for a nonsuit and entering judgment of dismissal.

APPEAL from the District Court of the Eighth Judicial District for Kootenai County. Hon. R. N. Dunn, Judge.

Action to recover damages for flooding plaintiff's land. Judgment for defendant. *Affirmed.*

R. M. Smith, for Appellant.

"Proof of the violation of any legal right entitles the injured party to some damages. If no actual damage appear, nominal damages are given for the technical injury. This rule is applied to all actions whether *ex contractu* or *ex delicto*." (5 Am. & Eng. Ency. of Law, 1st ed., 4.)

The fact, if it were a fact, that the forces of nature or some other cause not arising from an act of the plaintiff combined with the act of the defendant to produce the injury would not relieve the defendant from liability. (Sutherland on Pleading, sec. 4353; *Learned v. Castle*, 78 Cal. 454, 18 Pac. 872, 21 Pac. 11; *Axtell v. Northern Pac. Ry. Co.*, 9 Ida. 392, 74 Pac. 1075.)

John P. Gray, for Respondent.

In order to take the case to the jury, there must have been some evidence that the dams of the respondent were responsible in part, at least, for the alleged injury to the appellant's land. There is no such testimony in the record. (*Steel Car Forge Co. v. Chec*, 184 Fed. 868, 107 C. C. A. 192; *Richards v. Peter*, 70 Mich. 286, 38 N. W. 278; *Newsome v. Western Union Tel. Co.*, 153 N. C. 153, 69 S. E. 10; *Central of Georgia Ry. Co. v. Dorsey*, 116 Ga. 719, 42 S. E. 1024; *Southern Ry. Co. v. Sittasen*, 166 Ind. 257, 76 N. E. 973; *Atchison T. & S. F. Ry. Co. v. Thomas*, 70 Kan. 409, 78 Pac. 861.)

The burden of proof is upon the appellant to show that the dams of the respondent at least contributed to the alleged injury to his land. If the lands of the appellant are at such an elevation that they are not and cannot be affected by the dams of the respondent, then the mere fact that some other lands are affected by respondent's dams does not entitle the appellant to recover for fictitious injuries to his land.

SULLIVAN, C. J.—This action was brought to recover damages alleged to have been sustained by the plaintiff, who is appellant here, for the alleged flooding of about 32 acres of his land in the years 1909, 1910 and 1911, alleged to have been caused by the erection and maintenance by the defendant of dams across Spokane river at Post Falls in Kootenai county.

The respondent in its answer admitted the construction of the dams referred to, but denied that the plaintiff's lands had been injured by the erection and maintenance thereof.

Upon the issues made the court tried the case with a jury, and after the plaintiff had introduced his evidence and rested, the respondent moved for a nonsuit and a dismissal of the action upon the ground that the plaintiff had failed to prove a sufficient case to go to the jury. The court granted said motion and entered judgment of dismissal. The appeal is from the judgment.

The main issue in the case was whether or not any of the lands of appellant were at such an elevation that the dams of

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respondent could in any manner affect them by flooding them. The lands of appellant are situated along a stream which flows into Lake Coeur d'Alene, which stream is subject to spring freshets. Both before and since the construction of said dams the lands of the appellant were subject to annual overflow in the spring time. Some years the flood would come earlier than in other years, and in some years it would last longer than during others. When the floods began late and remained long upon the surface of the ground, the lands flooded produced poor crops, and when the floods came early and went off early, good crops were grown on the flooded lands.

The evidence introduced on behalf of appellant showed that in the year 1909, one of the years when he claimed his lands were greatly injured, he got 98 tons of timothy and red-top hay off the 32 acres of land he claimed was injured. In the succeeding year, 1910, he got only 30 tons, but the next year (1911), he harvested the biggest crop he ever got from said lands. The evidence shows that in the year 1910 there was a flood upon and around Lake Coeur d'Alene that had never been exceeded but once and that was in the year 1894. The high floods of that year evidently were the cause of the poor crop.

There is no evidence in the record, and there was none offered and rejected, to show that at the time of the flood the respondent's gates on its dams were closed or that its dams in anywise affected the elevation of the lake. On the other hand, there is testimony to show that there was a strong current in the Spokane river, showing that the water was freely flowing out of the lake. Adjacent to said lake there are low lands that are affected by said dams, and counsel for appellant undertook to show the flood condition of those low lands situated between the lake and appellant's land since the construction of said dams, and sought to show that his own lands were affected by showing that other lands were affected. The trial court held that the question for determination was not the effect of the construction of said dams upon some other land of different elevation from that of appellant's. It does

not appear from the record that the appellant attempted to show that the dams themselves were responsible for the high-water levels in said lake at the times his land was flooded.

The dams were completed in 1906. There is no evidence to show that the water conditions on appellant's land were different from what they were prior to that year. Certain years there was very high water in that region, and other years not so high, and the evidence shows that that was the condition since the construction of said dams, so far as appellant's land is concerned, and the fact that other lands lower down than plaintiff's were overflowed by reason of the construction of said dams was not evidence that his land was overflowed by reason of their construction.

The trial court evidently took the view that the plaintiff had failed to produce any evidence to show that the dams of defendant were responsible for the floods upon his land, and that plaintiff's own evidence showed that the condition of his land since 1907 was not different from its condition prior to that year, that being the first year that said dams were in use.

It was necessary for the plaintiff to prove, in order to recover in this action, that said dams raised the level of the water in the lake and stream on which said land is located sufficiently high to submerge his land to a greater depth than it had been submerged by the flood waters prior to the erection of said dams. This he failed to do, and the fact that lands of a lower elevation had been submerged did not and could not prove that his own lands had been submerged by reason of said dams.

It is a part of the history of the state that the water levels of Lake Coeur d'Alene have been kept for each day for a number of years by the U. S. Geological Survey, and it seems to us that it would have been an easy matter to show the water levels of said lake during a number of years and thus prove conclusively the difference between the water levels of 1909, 1910 and 1911 and the water levels of said lake for years prior thereto. And certainly the elevation of the land in question above sea level could have been ascertained with accuracy. Such evidence would have certainly been much

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better than the opinions or guesses of any witnesses in regard to those matters.

The trial judge in granting the motion for a nonsuit stated as follows: "In my judgment the plaintiff has wholly failed to connect the defendant with the injury of which he complains, and for that reason I have granted the motion for a nonsuit." The trial court was fully justified in coming to that conclusion.

The judgment must therefore be affirmed, and it is so ordered, with costs in favor of the respondent.

Budge and Morgan, JJ., concur.

(June 1, 1915.)

NORA SMITH, Executrix, etc., Respondent, v. THE WALLACE NATIONAL BANK, a Corporation, and H. F. SAMUELS, Appellants; F. C. NORBECK, D. E. KEYS and THOMAS McCABE, Respondents.

[150 Pac. 21.]

PRACTICE—ASSIGNMENTS OF ERROR—TRUST FUND—BANKS AND BANKING—KNOWLEDGE OF CASHIER—NOTICE TO BANK—NEW TRIAL.

1. The purpose of the provision in the rules of practice that appellant's brief shall contain a distinct enumeration of the several errors relied on is to require appellant to inform respondent and this court what action of the trial court is relied upon for a reversal of the judgment or order appealed from, and when it is stated in appellant's brief that the appeal is from the order granting a new trial, and when no other action of the trial court is complained of, the appeal will be considered upon its merits, although appellant's brief does not contain an assignment of errors in the usual form.

2. *Held*, that the rule that "an owner is always entitled to follow a trust fund wherever it may be found" does not apply to the facts in this case as the verdict shows them to have been found by the jury.

3. While it is a general rule that a bank is bound to take notice of facts pertaining to its business within the knowledge of its

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cashier, there are exceptions to the rule, and it is not bound by notice of facts relating to an independent fraudulent act which the cashier is committing on his own account, the communication of which would prevent the consummation of the fraud, nor when he is openly acting on his own behalf, or on behalf of another in a transaction with the bank.

4. *Held*, that under the facts in this case the appellants are not liable for the acts of the cashier in conducting the business entrusted to him by respondent's testatrix.

5. Where the record does not show the ground upon which a new trial was granted, and no error warranting it appears, the order granting it will be reversed upon appeal.

APPEAL from the District Court of the First Judicial District for Shoshone County. Hon. William W. Woods, Judge.

Action for damages for failure to record a mortgage and for procuring it to be released when recorded, whereby plaintiff's security was lost. Judgment for defendants. Order granting a new trial. *Reversed*.

John P. Gray and John H. Wourms, for Appellants.

The acts of Norbeck were clearly without the scope of his employment. (*City Electric Street Ry. Co. v. First Nat. Bank*, 65 Ark. 543, 47 S. W. 855; *Hummell v. Bank of Monroe*, 75 Iowa, 689, 37 N. W. 954; *Langlois v. Gragnon*, 123 La. 453, 49 So. 18, 22 L. R. A., N. S., 414; *School Dist. v. De Weese*, 100 Fed. 705; *Sherwood v. Home Savings Bank*, 131 Iowa, 528, 109 N. W. 9; *Lilly v. Hamilton Bank*, 178 Fed. 53, 102 C. C. A. 1, 29 L. R. A., N. S., 558; *Schumacher v. Greene Cananea Copper Co.*, 117 Minn. 124, Ann. Cas. 1913C, 1115, 134 N. W. 510, 38 L. R. A., N. S., 180; *Kennedy v. Otoe County Nat. Bank*, 7 Neb. 59; *State v. Commercial Bank*, 14 Miss. 218, 45 Am. Dec. 280; *Ballston Spa Bank v. Marine Bank*, 16 Wis. 120.)

The jury by their verdict upon all of the disputed questions of fact found in favor of the appellants, and under the decision of this court in the case of *Maw v. Coast Lumber Co.*, 19 Ida. 396, 114 Pac. 9, the trial court as well as this

Argument for Respondent.

court is bound by the findings of the jury upon these questions. ¹ No legal cause has been given why the new trial was granted and under the cases a new trial should not be granted except for some legal cause. (*Clifford v. Denver etc. Ry. Co.*, 12 Colo. 125, 20 Pac. 333; *Braithwaite v. Aiken*, 2 N. D. 57, 49 N. W. 419.) A new trial should not be granted unless it appears that an injustice has been done. (*Manning v. German Ins. Co.*, 107 Fed. 52, 46 C. C. A. 144; *Barksdale v. Smith*, 31 Ga. 671; *Woodward v. Horst*, 10 Iowa, 120; *Rowe v. Matthews*, 18 Fed. 132.)

Chas. E. Miller and Featherstone & Fox, for Respondent Smith.

When, in the course of his employment, an officer or other agent of a bank acquires knowledge or receives notice of any fact material to the business in which he is employed, the bank is deemed to have notice of such fact. (Tiffany on Banks, 333; 5 Cyc., subd. 2-c, 460.)

A more stringent rule applies to the president, cashier or other managing officer, because he devotes his chief attention to the business of the bank. All the knowledge acquired by him pertaining to its affairs is imputed to the institution. (Bolles on Banking, 398 (5).) Notice to the cashier is notice to the bank. (*First Nat. Bk. v. Ledbetter* (Tex. Civ.), 34 S. W. 1042; *City Nat. Bank v. Martin*, 70 Tex. 643, 8 Am. St. 632, 8 S. W. 507.)

A bank is liable for the fraud of its agent committed in the course of the bank's business, at least to the extent of the benefit received by it from the fraud. (*Binghamton Trust Co. v. Auten*, 68 Ark. 299, 82 Am. St. 295, 57 S. W. 1105.)

In such a case as this the bank should be held responsible instead of an innocent party upon every principle of reason and morality. (*Cooke v. State Nat. Bk.*, 52 N. Y. 96, 11 Am. Rep. 667; *Farmers' etc. Bank v. Butchers' etc. Bank*, 16 N. Y. 125, 69 Am. Dec. 678; *New York & N. H. R. v. Schuyler*, 34 N. Y. 30; *Bell v. Campbell*, 123 Mo. 1, 45 Am. St. 505, 25 S. W. 359.)

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The owner is always entitled to follow a trust fund wherever he may find it. (Bolles on Banking, 495; *Bank of Virginia v. Domestic Sewing Machine Co.*, 99 Va. 411, 86 Am. St. 891, 39 S. E. 141; *Overseers v. Bank of Virginia*, 2 Gratt. (Vt.) 544, 44 Am. Dec. 399; *State v. Bruce*, 17 Ida. 1, 134 Am. St. 245, 102 Pac. 831.)

Failure to assign errors upon appeal from an order granting a new trial is fatal and amounts to a waiver of all error. (2 Cyc. 1010; *Hollister v. State*, 9 Ida. 8, 71 Pac. 541.)

All exceptions taken in the court below will be treated as waived unless they are assigned as errors in the supreme court. (*Purdy v. Steel*, 1 Ida. 216.)

Errors not set out in the specifications of error, in the statement of the case and in the bill of exceptions will not be considered on appeal. (*Gaffney v. Hoyt*, 2 Ida. (184) 199, 10 Pac. 34.) Error assigned in the transcript but not referred to in brief is waived. (*Idaho Mer. Co. v. Kalanquin*, 8 Ida. 101, 66 Pac. 933; *Byron v. First Nat. Bank* (Or.), 146 Pac. 516; *Adrich v. Chemical Nat. Bk.*, 176 U. S. 618, 20 Sup. Ct. 498, 44 L. ed. 611; *Wyman v. Wallace*, 201 U. S. 230, 26 Sup. Ct. 495, 50 L. ed. 738; *Poppleton v. Wallace*, 201 U. S. 245, 26 Sup. Ct. 498, 50 L. ed. 743; *United States Nat. Bank v. First Nat. Bank*, 79 Fed. 296, 24 C. C. A. 597; *Merchants' Bank v. State Bank*, 10 Wall. (U. S.) 604, 19 L. ed. 1008; *Chapman v. First Nat. Bank* (Or.), 143 Pac. 630.)

MORGAN, J.—Since the appeal in this case was taken the respondent, Mary A. Smith, died. Her death has been suggested of record and by stipulation of the parties Nora Smith, her executrix, has been substituted as respondent.

This is an action commenced by Mary A. Smith against the Wallace National Bank and H. F. Samuels, president thereof, appellants, and against D. E. Keys, vice-president, F. C. Norbeck, cashier, and Thomas McCabe, assistant cashier of said bank, for damages for failure to record a certain mortgage given to secure the payment of a promissory note for \$3,000 due to her and for procuring the same to be released when recorded, whereby her security was lost and said prom-

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issory note became valueless. Norbeck failed to answer or otherwise appear in the case and the trial resulted in a verdict and judgment for the other defendants. An order was entered granting a new trial as to the bank and Samuels from which order this appeal is prosecuted.

Norbeck, who was a nephew of Mrs. Smith by marriage, on about June 1, 1908, visited her at her home in Tacoma, Washington, and on that occasion urged her to place in his hands to be loaned the sum of \$3,000, which amount of money she had on deposit in a bank in Tacoma. Upon his return to Wallace, Idaho, he wrote a letter which, while addressed to a daughter of Mrs. Smith, was intended for her information. It is in part as follows:

"Am all ready for the \$3,000 if you will send it to me at once. Can get you 1% per month and will mail you a draft for \$30 each month on any date you say for the interest. This will last for three months sure, and then I think I can get you a little better than that, so you are certain of \$30 per, *at least*. Send the draft payable to the Wallace Nat'l Bank, our new name, and I'll fix up the note, etc. and will guarantee everything to you as well."

Thereafter and about June 20, 1908, Mrs. Smith mailed to Norbeck a draft for the sum of \$3,000 payable to the Wallace National Bank. He placed the money to his own credit in the bank and immediately thereafter loaned it to one Herman Rogell, who was a customer of the bank and who was at that time indebted to it. Rogell applied a portion of the \$3,000 in payment of his indebtedness to the bank and paid Norbeck \$200 for procuring the loan for him. As evidence of the indebtedness to Mrs. Smith, Rogell gave his promissory note to Norbeck in the sum of \$3,000 and, to secure the payment of the same, he and his wife made, executed and delivered to Norbeck a mortgage, in which Norbeck was named as mortgagee, upon real property situated in the village of Mullan, Idaho. The mortgage was not recorded until March 10, 1910, and after its execution and before it was recorded Rogell deeded a portion of the property covered by it, by way of mortgage, to an innocent purchaser or encumbrancer

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for value and thereby, about one-third of Mrs. Smith's security was lost. On about September 9, 1910, Rogell was heavily indebted to the bank and, at the urgent and insistent request of its officers and directors that he reduce his indebtedness, he sold to one Sarah Flood the remainder of the property covered by the mortgage. When it was discovered by Mrs. Flood's attorney that the mortgage was of record against the property, Norbeck released it, thereby depriving Mrs. Smith of the remainder of her security. Mrs. Flood paid \$2,125 for the property which was applied toward the payment of Rogell's indebtedness to the bank. Thereafter Rogell was adjudged to be a bankrupt and Norbeck was convicted of a violation of the United States banking laws and was sent to the penitentiary.

It is contended by the respondent that said bank and its officers and agents, in order to protect and prolong the credit of Rogell and without any regard for the rights of Mrs. Smith wrongfully and fraudulently neglected and refused to record the mortgage until after a portion of the property had been disposed of as aforesaid, and wrongfully and unlawfully released and discharged the lien of said mortgage in order that the remainder of it might be sold to Mrs. Flood, thereby depriving Mrs. Smith of her entire security, to her injury and damage in the sum of \$3,606.

The appellants contend that in procuring the money from Mrs. Smith Norbeck did not act as an officer or agent of the bank, and that in making the loan to Rogell and in neglecting to record the mortgage and in releasing it after it had been recorded he acted, not as the agent of the bank, but as the agent of Mrs. Smith; that none of his said acts were within the scope of his authority as cashier of the bank and that none of the officers of the bank, except Norbeck, knew anything about any of the transactions above related; that all of his acts with respect to the loan were committed without any knowledge of the rights of Mrs. Smith upon the part of any of the officers or agents of the bank, except himself.

Our attention is directed to the fact that appellants' brief contains no assignment of errors. Rule 45 of the rules of

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practice of this court is, in part, as follows: "The brief of the appellant and the plaintiff in error shall also contain a distinct enumeration of the several errors relied on." The purpose of this provision is to require the appellant to inform the respondent and this court what action of the trial court is relied upon for a reversal of the judgment or order appealed from. While appellants' brief does not contain an assignment of errors in the usual form, it is therein stated that the appeal is from the order granting the plaintiff a new trial, and since no other action of the trial court is complained of, neither the respondent nor this court has been misled or left in doubt as to the error relied upon by appellants and the appeal will be considered upon its merits.

The trial judge has not indicated the ground upon which his action in granting a new trial was based. A careful examination of the record fails to disclose a single error committed during the course of the trial. The court's rulings as to the admissibility of evidence are correct and the instructions given to the jury fully and clearly state the law applicable to the case. The only material conflict in the evidence is between the testimony of the witness Rogell, for the plaintiff, upon the one hand, and that of a number of witnesses for the defendants supported by documentary evidence upon the other, as to the knowledge of the directors and officers of the bank, other than Norbeck, relative to the loan of \$3,000 to Rogell, the failure to record the mortgage and placing of record the release after the mortgage had been recorded. The jury, by its verdict, viewed in the light of the instructions given to it by the trial judge, found that Mrs. Smith sent the money to Norbeck, not to the bank, to be loaned; that Norbeck, not the bank, acted as her agent; that none of its officers, other than Norbeck, knew of the transaction, and that neither the bank nor its officers procured him to withhold the mortgage from record or, with knowledge of Mrs. Smith's loan, to release it after it was recorded.

Without quoting from the testimony and without indulging in comment upon the apparent credibility or lack of credibility of any of the witnesses, we may say these questions of

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fact could not well have been resolved otherwise than they were by the jury in its verdict, for the great preponderance of the evidence supports the contention of appellants.

It is urged by respondent that the owner is always entitled to follow a trust fund wherever it may be found. In this case the bank received a part of the money arising from the loan to Rogell and that arising from the sale of his property, without fraud upon its part, in the regular course of business, in partial payment of his indebtedness and without notice of the loan by Mrs. Smith. The principle contended for does not apply to the facts as we view them and as the verdict shows them to have been found by the jury.

A number of points are urged by respondent in support of the order granting a new trial, among them being that the verdict was contrary to the evidence; that certain evidence offered by appellant should not have been admitted and that the court erred in refusing to give to the jury certain instructions requested by respondent. The rulings of the learned trial judge upon these points were so manifestly correct that we do not believe comment upon them to be necessary. This case, however, presents a question of law which is relied upon by respondent and which may be stated as follows: Did the bank, through Norbeck, have such notice as to render it liable in damages for failure to record the mortgage before a portion of the security was lost, and was his knowledge of the ownership of the \$3,000 and of the mortgage given to secure the payment of it, notice to the bank which required it to apply the money arising from the sale of the property toward the payment of Rogell's debt to Mrs. Smith and precluded it from applying said money toward the payment of his debt to itself?

In support of their position counsel for respondent quote from Tiffany on Banks and Banking, p. 336: "The cashier being the officer of the bank by whom its financial transactions are conducted, the bank is generally bound by his knowledge." The entire article on "notice" from which the foregoing extract is quoted discloses that there are certain exceptions to the rule, one of which applies to this case. The

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author has briefly and fairly restated the doctrine of said article as follows:

"In General.—In accordance with the general rule of agency, when, in the course of his employment, an officer or other agent of a bank acquires knowledge or receives notice of any fact material to the business in which he is employed, the bank is deemed, as a rule, to have notice of such fact; and in most jurisdictions knowledge of a fact material to the business in which the agent is employed, if actually present in his mind during the agency and while acting in the bank's behalf, although acquired by him outside of his agency, is deemed, as a rule, notice to the bank.

"Disclosure Against Interest.—The knowledge of the agent will not be imputed to the bank, when the agent is engaged in committing an independent fraudulent act upon his own account, and the knowledge sought to be imputed is of facts which relate to that act, and which, if communicated, would prevent the consummation of the fraud, or when the agent is openly acting on his own behalf, or on behalf of another in a transaction with the bank; but when, in any transaction, the agent does an act as the sole representative of the bank, and is not acting openly on behalf of himself or another, although his conduct may be fraudulent, it is generally held that the bank may not avail itself of the act, in order to retain an advantage or to assert a claim founded thereon, without being charged with his knowledge."

In this case Norbeck was not acting for the bank, neither was he acting in the course of his employment, and the facts disclosed by the record fully justify the conclusion that he was engaged in committing an independent fraudulent act upon his own account, and that the knowledge sought to be imputed was of facts which related to that act, and which, if communicated, would prevent the consummation of the fraud.

In case of *State v. Commercial Bank of Manchester*, 14 Miss. 218, 45 Am. Dec. 280, it is said (quoting from the syllabus): "Cashier of a bank is but the agent of the corporation,

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and his acts are governed by the general rule for agents, viz., that if they exceed their authority they do not bind their principal."

The supreme court of Nebraska in case of *Kennedy v. Otoe Co. Nat. Bank*, 7 Neb. 59, said: "Like other agents, a bank president must act within the scope of his authority in order to bind his principal; unless his acts are ratified."

It is said in case of *School District v. De Weese*, 100 Fed. 709, as follows:

"It would be a far-reaching and dangerous doctrine to establish when the cashier of a bank, acting in his individual capacity, and for his own aggrandizement, receives in trust, as the agent of a third party, property or money, that because he is at the time cashier and active manager of the bank, and, as a mere matter of bookkeeping (done, doubtless, to cover up his own fraud), he first enters the proceeds on the books of the bank, to the bank's credit, and immediately passes the same to his own individual account, and forthwith checks the same out to his individual use, the bank should be affected with his guilty knowledge, and made to account for the fruit of his ill-gotten gains, when in point of fact the bank gained nothing in the end by the transaction. The bank in such case is not acting in privity with the agent of the third party. Thompson in these whole transactions was acting as the agent of the plaintiff, and not as the agent of the bank."

In case of *Hummell v. Bank of Monroe*, 75 Iowa, 689, 37 N. W. 954, the supreme court of Iowa said:

"The notice to the principal of such facts as were known to the agent, and were present in his mind at the time of the transaction, but the knowledge of which was not acquired in the business of the agency, is constructive. Ordinarily the circumstances are such as to beget a presumption that the communication was in fact made. But when they are of such character that, according to all human experience and observation, the probability is just the reverse, it would be absurd to indulge that presumption."

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The supreme court of Arkansas, in case of *Grow v. Cockrill*, 63 Ark. 418, 39 S. W. 60, 36 L. R. A. 89, in passing upon the question of the liability of a bank for the acts of its cashier, said:

“Again, it must not be lost sight of that, while the principal is responsible for the tortious acts of his agent committed while in the exercise of his authority, as such, yet the principal is subject to another principle, and that is the acts of the agent must be such as the principal has a right to require of him, or he will not be liable by operation of law, unless he has made himself actually liable otherwise. The services the cashier undertook to render for the appellant seem to have been a mere gratuity, done as an accommodation to her, if not deceptively. There is no showing that the bank, by its charter, had authority to transact such business as that of loaning the money of its depositors or of other people in general. Such authority we have failed to find in the national banking law, and the decisions on the subject, or rather the decisions involving analogous facts, all seem to be to the effect that the business of a broker (and a broker’s business is to loan the money of others, or borrow for others, or buy and sell property of others, and such like) is not a business in which a national bank can lawfully engage, since it is not mentioned in the national bank act, and the act is strictly construed as against the grantee corporation as to powers conferred, as in all cases of private corporate grants of powers.”

Counsel for respondent have cited a number of authorities in support of the contention that the knowledge of Norbeck was notice to the bank. An examination of these authorities will, we think, readily distinguish them from the case at bar. We will briefly comment upon a few of them.

In case of *Byron v. First Nat. Bank* (Or.), 146 Pac. 516, the question was whether Mrs. Byron, who was a depositor in the bank, authorized Sheridan, its president, individually to check out the money and lend it or use it for himself, or whether she contracted to lend it to the bank. The court said: “It may be conceded, and it is the law, that a national

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bank cannot act as a broker; so, if the contract is to be construed in that aspect, plaintiff's case must fail. It is either a loan to the bank or a private transaction with Sheridan." The court examined the evidence and found sufficient to justify the jury in finding the loan was to the bank.

In case of *Chapman v. First Nat. Bank* (Or.), 143 Pac. 630, Chapman was a depositor in the bank. He gave Sheridan, president of the bank, authority to loan his money and Sheridan loaned it to himself. The court said:

"In this case all admit that the money was on deposit with the defendant bank at the time plaintiff requested that a 'loan' be effected, thereby creating the relation between the parties litigant of debtor and creditor. The money being on deposit at the time of its appropriation by the president, the board of directors, as the 'mind' of the corporation, having a general superintendency over and the management of the business affairs and transactions of the bank, was bound to know of the relation existing between plaintiff and defendant and the incidental duties flowing therefrom. So defendant, in honoring the memorandum check bearing the name of plaintiff as signed by Sheridan, president of the bank, made the act of the president the act of itself. If Sheridan had converted the money without the bank having received it or without credit being given to plaintiff on its books, the bank would not then be liable."

In the case of *City Nat. Bank v. Martin*, 70 Tex. 643, 8 Am. St. 632, 8 S. W. 507, Martin was a depositor in the bank and requested the teller to loan money for him which he had on deposit. The loan was made and the note procured as evidence thereof was left with the bank for collection. When the note was paid the teller embezzled the money and deposited it in the bank to his own credit. The court held that at the time the teller received payment of the note he was acting in the apparent scope of his authority and knew the money belonged to appellee; that his knowledge, under the circumstances, must be imputed to the bank.

In the case of *Smith v. Anderson*, 57 Hun, 72, 10 N. Y. Supp. 278, it is decided that where the president of a bank

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receives money which is deposited in the bank, his knowledge will be as that of the bank and it is liable to the depositor, even though the president misappropriates the money. But that if the president had converted it without the bank having received it or without credit being given on its books, it would not be liable.

We conclude that under the facts in this case neither the Wallace National Bank nor Samuels, its president, are liable for the acts of Norbeck in conducting the business entrusted to him by Mrs. Smith.

This court is not unmindful of the oft-repeated rule that "the trial court possesses a discretion to be exercised wisely in the granting or refusal of new trials, and that such discretion will not be by the appellate court disturbed unless it manifestly and clearly appears to have been exercised unwisely and to have been manifestly abused." However, in case of *Lowe v. Long*, 5 Ida. 122, 47 Pac. 93, this additional rule is announced (quoting from the syllabus): "Where the record does not show the ground upon which a new trial was granted, and no error warranting a new trial is apparent from the record, the order granting a new trial will be reversed." (See, also, *Wood Livestock Co. v. Woodmansee*, 7 Ida. 250, 61 Pac. 1029; *Clifford v. Denver S. P. & P. R. Co.*, 12 Colo. 125, 20 Pac. 333.)

The order of the judge of the district court granting a new trial is reversed, and the judgment is reinstated and held to be in full force and effect. Costs are awarded to appellants.

Sullivan, C. J., and Budge, J., concur.

Argument for Appellant.

(June 3, 1915.)

R. A. GRAHAM, Respondent, v. COEUR D'ALENE & ST.
JOE TRANSPORTATION COMPANY, LIMITED, a
Corporation, Appellant.

[149 Pac. 509.]

PLEADING—EVIDENCE—CONFLICT—PHYSICAL PAIN AN ELEMENT OF DAMAGE—MISCONDUCT OF JURY.

1. In an action for damages for personal injury the complaint must state all facts necessary to inform the defendant of all acts or omissions relied upon for a recovery, but only ultimate facts need be pleaded.

2. Although no damage is claimed because of loss of employment, evidence showing that plaintiff suffered inconvenience and pain after the accident in attempting to perform his work is competent as tending to show the extent of his physical injury and suffering.

3. Where there is a substantial conflict in the evidence, a judgment based upon a verdict will not be disturbed upon appeal.

4. Physical pain suffered by the plaintiff as a direct result of the accident is a proper element of damage, although the evidence fails to show that he sustained financial loss by reason of his injury.

5. One of the attorneys for appellant filed his affidavit in support of a motion for a new trial, alleging that he had been told by members of the jury that the verdict was reached as the result of chance, and detailing certain purported facts which, if true, would amount to misconduct on the part of the jury. The respondent filed the affidavits of two members of the jury denying that chance was resorted to and showing that the conduct of the jury was in all respects, regular and proper. *Held*, that the trial judge was justified in reaching the conclusion that appellant's contention was not established.

APPEAL from the District Court of the Eighth Judicial District for Kootenai County. Hon. R. N. Dunn, Judge.

Action for damages for personal injuries. Judgment for plaintiff. *Affirmed*.

Elder & Elder, for Appellant.

A careful reading of the complaint will disclose the fact that plaintiff failed to state a cause of action. He has not

Argument for Respondent.

alleged or claimed damage from any permanent injury, and does not allege loss of earning capacity or loss of services by reason of the alleged injuries. The court should not have permitted the witness, Graham, testifying in his own behalf, to give evidence of his sickness and his inability to work unless he had connected the same with the injury which he alleged he received by reason of the negligence of the defendant.

In no place does the plaintiff connect his alleged nervousness and mental disorder with the alleged injury which he received at the hands of the defendant. (Hutchinson on Carriers, secs. 1425, 1427; *Maynard v. Oregon Ry. & N. Co.*, 46 Or. 15, 78 Pac. 983; 68 L. R. A. 477; *Wilkinson v. Detroit Steel & S. Works*, 73 Mich. 405, 41 N. W. 490; *Smith v. Postal Tel. & Cable Co.*, 174 Mass. 576, 75 Am. St. 374, 55 N. E. 380, 47 L. R. A. 323; *Mitchell v. Rochester R. Co.*, 151 N. Y. 107, 56 Am. St. 604, 45 N. E. 354, 34 L. R. A. 781; *Malcolm v. Richmond etc. R. Co.*, 106 N. C. 63, 11 S. E. 187.)

"The damages recoverable are dependent upon the circumstances of each particular case, and although the discretion of the jury must be largely depended on, the amount of recovery must be based on evidence." (*St. Joseph etc. R. Co. v. Hedge*, 44 Neb. 448, 62 N. W. 887; *Western Union Tel. Co. v. Simpson*, 73 Tex. 422, 11 S. W. 385; 13 Cyc. 136.)

Taylor & Hull, for Respondent.

It is an established rule of pleading that probative facts need not be pleaded. (*McLean v. City of Lewiston*, 8 Ida. 472, 69 Pac. 478; *Croft v. Northwestern Steamship Co.*, 20 Wash. 175, 55 Pac. 42; *Carscallen v. Coeur D'Alene etc. Transp. Co.*, 15 Ida. 444, 98 Pac. 622, 16 Ann. Cas. 544.)

Mental and physical suffering are elements of general damage, the amount of which must be left to the good sense and sound judgment of the jury, whose verdict should not be disturbed except in case of a clear abuse of discretion. This is regardless of the fact whether or not the injury is permanent, and whether or not loss of earning capacity or loss

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of service has been alleged or proved. (*Horn v. Boise City Canal Co.*, 7 Ida. 640, 65 Pac. 145; *Denbeigh v. Oregon-Washington R. & N. Co.*, 23 Ida. 663, 132 Pac. 112; *Jones v. City of Caldwell*, 20 Ida. 5, 116 Pac. 110, 48 L. R. A., N. S., 119; *Tarr v. Oregon Short Line Ry. Co.*, 14 Ida. 192, 125 Am. St. 151, 93 Pac. 957; *Eagle Packet Co. v. Defries*, 94 Ill. 598, 34 Am. Rep. 245.)

A person injured may be allowed to give testimony concerning his inability to perform his work in a proper manner after his injury for the purpose of proving the continuing effects of the same with regard to pain, even though no damage is claimed for loss of services. (*Louisville & N. R. Co. v. Kemp's Admr.*, 149 Ky. 344, 149 S. W. 835; *Craw v. Chicago City Ry. Co.*, 159 Ill. App. 100; *Giffen v. City of Lewiston*, 6 Ida. 231, 55 Pac. 545.)

When the facts are disputed negligence is a question for the jury. (*Wheeler v. Oregon R. & Nav. Ry.*, 16 Ida. 375, 102 Pac. 347; *Fleenor v. Oregon Short Line Ry.*, 16 Ida. 781, 102 Pac. 897; *Calkins v. Blackwell Lbr. Co.*, 23 Ida. 128, 129 Pac. 435; *Staab v. Rocky Mt. Bell Tel. Co.*, 23 Ida. 314, 129 Pac. 1078.)

"In estimating damages in case of injury to a person the jury may take into consideration the physical pain and mental suffering undergone by the plaintiff as a result of the injury inflicted. Where pain is claimed as an element of damage the impossibility of definitely measuring the damages by a money standard is no ground for denying pecuniary relief." (13 Cyc. 137; *Johnson v. Wells, Fargo & Co.*, 6 Nev. 224, 3 Am. Rep. 245, and cases cited; *Alabama Gt. Southern Ry. v. Burgess*, 114 Ala. 587, 22 So. 169.)

MORGAN, J.—This is an action for damages for personal injuries alleged to have been sustained by respondent while landing from appellant's steamboat "Flyer" at the end of a journey during which he was a passenger upon the boat. It appears that respondent on the 5th day of August, 1912, procured and paid for transportation upon the "Flyer" from a point known as Bogel's Landing to a point known as Sort-

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ing Gap, which last mentioned place is a flag station where the steamboats of appellant stop when occasion requires to take on or discharge passengers or freight; that appellant owns no wharf or landing place there but makes use of the wharf of the St. Joe Boom Company; that on the occasion of the accident to respondent a tug belonging to the boom company was moored to the wharf and that a landing was attempted to be made by appellant's steamboat alongside the tug. There is conflict in the evidence as to whether or not a line was put out from the "Flyer" and made fast to the tug before the gangplank was placed in position for respondent to cross upon from one boat to the other, it being contended by respondent that no line was put out or made fast, while there was evidence introduced on behalf of appellant to the contrary. If a line was passed from the "Flyer" to the tug it had not been so adjusted, before the gangplank was put down and respondent went upon it, as to prevent the "Flyer" from drifting more than the length of the gangplank from the tug, for it is undisputed that while respondent was on the gangplank the end which had been placed upon the tug slipped off, throwing him into the water. It also appears that in falling respondent struck against the tug in such a manner that one of his ribs was broken.

It is contended by respondent and denied by appellant that before he went upon the gangplank he was directed to do so by one of the employees on the boat. Upon behalf of appellant it is contended, and denied by respondent, that as he was about to go upon the gangplank, he was warned by one of the officers of the boat not to do so.

While it is shown by the evidence that respondent required the services of a physician by reason of the injuries received, no claim is made for damages on account of expenses incurred in this behalf, neither does he rely upon loss of time or employment as an element of damages, nor is it shown that the injuries he received are permanent, but he does rely for a recovery upon the physical pain he suffered and the physical mental and nervous shock resulting from the accident.

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The trial resulted in a verdict and judgment for respondent in the sum of \$500. This appeal is prosecuted from the judgment and from an order overruling a motion for a new trial and appellant has presented twenty-four assignments of error in support thereof.

The first assignment is that the court erred in overruling the demurrer to the amended complaint, which demurrer is based upon the grounds, first, that said amended complaint does not state facts sufficient to constitute a cause of action, and, second and third, that said amended complaint is ambiguous, unintelligible and uncertain.

We find no error in the ruling complained of. The complaint states with definiteness and certainty the negligence of appellant in not fastening the steamboat to the tug; the fact that by reason thereof the gangplank slipped from the tug and that respondent was thereby thrown against the tug and into the water, and it describes his injuries and pain and suffering resulting therefrom.

In case of *McLean v. City of Lewiston*, 8 Ida. 472, 69 Pac. 478, this court said: "After a most careful consideration of all of the grounds of said demurrer, we cannot say that the court erred in overruling it. It is true that the complaint is not as specific as some pleaders would have made it, but we think the ultimate facts therein stated constitute a cause of action. In this class of cases the pleader must state all facts necessary to inform the defendant of all acts or omissions that are charged against the defendant, so as to enable him to make a full and complete defense thereto. It is an established rule of pleading that probative facts need not be pleaded." (See, also, *Croft v. Northwestern Steamship Co.*, 20 Wash. 175, 55 Pac. 42.)

Assignments numbered 2 to 11, inclusive, are directed to the action of the court in overruling certain objections and sustaining others to questions propounded to the witnesses at the trial. These assignments relate principally to the action of the court in the admission of evidence tending to show the effect of respondent's injuries upon him and that he suffered considerable inconvenience and pain in attempt-

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ing to perform his work after the accident. The evidence was offered and admitted upon the theory that it tended to show the extent of the injuries and not in support of any claim of financial loss. Financial loss was not alleged in the complaint and the court instructed the jury upon this point to the effect that it could not, if it should find for respondent, allow him any damages for loss of time or for loss of earning capacity. Upon the theory above stated the rulings complained of were correct. (*Giffen v. City of Lewiston*, 6 Ida. 231, 55 Pac. 545; *Tarr v. Oregon Short Line R. R. Co.*, 14 Ida. 192, 125 Am. St. 151, 93 Pac. 957.)

At the close of the testimony on behalf of respondent appellant moved for a nonsuit and when the proof on behalf of both parties was concluded this motion was renewed. Appellant also moved for an instructed verdict in its favor, all of which motions raised the question of the sufficiency of the evidence to sustain a verdict in favor of respondent. The court overruled the motions.

Assignments of error numbered 12 to 17, inclusive, question the sufficiency of the evidence. A careful examination of the record convinces us that neither of appellant's motions for nonsuit nor its motion for an instructed verdict should have been granted, and that the evidence, taken as a whole, is sufficient to sustain the verdict and judgment. The rule is well settled that a judgment will not be disturbed upon appeal when it is based upon a verdict where there is substantial conflict in the evidence. (See *Montgomery v. Gray* (on rehearing), 26 Ida. 583, 144 Pac. 646, and cases therein cited.)

It is urged by appellant that since the evidence fails to show respondent sustained financial loss by reason of his injuries, and since his injuries are not permanent, he is not entitled to a judgment for more than nominal damages. We are not in accord with this contention. The evidence shows that, as a direct result of the accident, respondent suffered considerable physical pain, and this is a proper element of damage. (*Tarr v. Oregon Short Line R. R. Co.*, *supra*.)

Points Decided.

Assignments numbered 18 to 24, inclusive, present as erroneous certain instructions given and others refused by the court. The court's instructions to the jury, taken as a whole, correctly state the law applicable to the facts in this case. We find no error therein.

It is also contended by appellant that the jury resorted to chance in arriving at its verdict. The affidavit of one of appellant's attorneys was filed in support of a motion for a new trial, alleging that members of the jury had informed him that each juror wrote or caused to be written down the amount which he believed the respondent entitled to recover, and that the amounts were added and the sum so obtained was divided by twelve, which result was returned into court as the verdict of the jury. In opposition to the motion for a new trial respondent filed the affidavit of two members of the jury denying that such a method of reaching a verdict was resorted to, stating the manner in which it was reached and showing that the conduct of the jury was, in all respects, regular and proper. We conclude, as the trial judge no doubt concluded, that appellant's contention was not established. /

We find no error in the record and the judgment of the trial court is affirmed. Costs are awarded to respondent.

Sullivan, C. J., and Budge, J., concur.

(June 5, 1915.)

W. A. COREY, Trustee in Bankruptcy of R. J. JOHANNES,
Appellant, v. BLACKWELL LUMBER COMPANY, a
Corporation, and Mrs. R. J. JOHANNES, Respondents.

[149 Pac. 410.]

CONTINUANCE—DISCRETION OF COURT—NO ABUSE OF.

1. The granting or refusing to grant a continuance of a case is largely in the sound discretion of the trial court, and held, in this case, that under the facts presented by the affidavits for a continuance, the court did not abuse its discretion in refusing to grant a continuance.

Argument for Respondents.

APPEAL from the District Court of the Eighth Judicial District for Kootenai County. Hon. Robert N. Dunn, Judge.

Action to recover the amount of an alleged fraudulent preference made by a bankrupt. Motion for a continuance denied, and judgment of dismissal entered. *Affirmed.*

E. R. Whitla and Samuel R. Stern, for Appellant.

We are not willing to concede that the court exercised a sound discretion. On the contrary, we insist that he abused the discretion vested in him. (*Hamilton v. Hamilton*, 21 Ida. 672, 123 Pac. 630.)

This court has not heretofore hesitated to reverse the trial court upon a matter of its discretion with respect to a continuance. (*Storer v. Heitfeld*, 17 Ida. 113, 105 Pac. 55.)

"It is error on the part of the court to allow the dismissal of a case for want of prosecution where the delay has been caused or acquiesced in by defendant or where defendant has been equally negligent in the prosecution of a counterclaim interposed by him." (14 Cyc. 446.)

John P. Gray and Frank M. McCarthy, for Respondents.

A motion for continuance is addressed to the sound legal discretion of the court, and unless there is a clear abuse of that discretion the order will not be disturbed on appeal. (*Richards v. Richards*, 24 Ida. 87, 132 Pac. 576; *De Puy v. Peebles*, 24 Ida. 550, 135 Pac. 264; *Holt v. Gridley*, 7 Ida. 416, 63 Pac. 188; *Reynolds v. Corbus*, 7 Ida. 481, 63 Pac. 884; *Richardson v. Ruddy*, 10 Ida. 151, 77 Pac. 972; *Storer v. Heitfeld*, 17 Ida. 113, 105 Pac. 55; *Rankin v. Caldwell*, 15 Ida. 625, 99 Pac. 108; *Müller v. Brown*, 18 Ida. 200, 109 Pac. 139; *Walsh v. Winston Bros. Co.*, 18 Ida. 768, 772, 111 Pac. 1090.)

"A party to an action must so arrange his engagements that he can be at the trial of his cause, if he deems it for his best interest or pleasure to do so. The business of the court and his adversary are quite as important as his own." (*Richardson v. Dinkgrave*, 26 La. Ann. 651; *Schlesinger v. Nunan*, 26 Ill. App. 525.)

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"The absence of counsel upon the calling of the case for trial is little favored by the courts as a ground for continuance." (*Lightner v. Menzel*, 35 Cal. 452; *Hammond v. Haws*, 11 Fed. Cas., p. 390, No. 6,002; *Baumberger v. Arff*, 96 Cal. 261, 31 Pac. 53; *Keegan v. Donnelly*, 11 Colo. App. 31, 52 Pac. 292; *Reynolds v. Campling*, 23 Colo. 105, 46 Pac. 639; *Cox v. Allen*, 91 Iowa, 462, 59 N. W. 335.)

"Due diligence is a question upon which the decision of the trial court is always presumably correct." (Vol. 4, Ency. Pl. & Pr. 856; *Blair v. Chicago etc. R. Co.*, 89 Mo. 383, 1 S. W. 350; *State v. Whitton*, 68 Mo. 91; *Boone v. Mitchell*, 33 Iowa, 45.)

SULLIVAN, C. J.—This action was brought by the plaintiff as trustee in bankruptcy of one R. J. Johannes against the Blackwell Lumber Company, a corporation, and Mrs. R. J. Johannes, to recover the amount of an alleged fraudulent preference attempted to be made by Johannes, the bankrupt, to his divorced wife, one of the defendants.

The lumber company was made a party defendant because it had in its possession money originally due to said R. J. Johannes, while the latter was engaged in the coal business in Spokane, Washington, and because a garnishment or attachment had been issued against it in an action brought by the Davenport Coal Company against the bankrupt to recover money due it from him.

The complaint was filed March 26, 1912, to which a demurrer was interposed and the demurrer was not disposed of until January, 1913, when it was sustained. The plaintiff elected to stand on his complaint and refused to plead further, and judgment of dismissal was entered and from that judgment an appeal was taken to this court (see *Corey v. Blackwell Lumber Co.*, 24 Ida. 642, 135 Pac. 742), and the judgment was reversed and the cause remanded for further proceedings.

On March 5, 1914, the cause came on for trial and the application was made to postpone the trial because the plaintiff had not yet taken the deposition of R. J. Johannes, which

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he desired to introduce on the trial of the case, and also because of the engagements of Mr. Stern, one of the attorneys for the plaintiff, who took the more active part in the management of this case and who was intending to try it with the assistance of Mr. Whitla. The court denied a continuance and thereupon dismissed the action for want of prosecution.

A motion was made to vacate and set aside the judgment of dismissal, and the appeal is from the judgment and the order denying the motion to vacate the judgment.

The errors assigned involve the action of the court in refusing to grant a continuance and in dismissing the case for want of prosecution.

The motion to vacate the judgment was presented on certain affidavits and the record in the case. A continuance was asked for the purpose of procuring the deposition of the bankrupt, and it was contended that all possible diligence was exercised in attempting to procure said deposition, but that it was impossible to locate the said Johannes, and that he was finally located in Helena, Montana.

It is a well-recognized rule that the discretion of the trial court in refusing or granting a continuance will not be reversed on appeal unless there appears from the record a clear abuse of such discretion, and we are unable to say from the whole record that the trial court abused its discretion in refusing to grant the continuance. None of the facts showing the diligence used by the appellant in ascertaining the whereabouts of said Johannes in order to take his deposition are set forth in the affidavits, and the trial court evidently concluded that when the plaintiff knew that said case would come on for trial he ought to have made certain efforts to locate his witnesses, and in case he could not do so, he ought to have set forth the facts in his affidavit as to what he had done in regard to the matter. If the plaintiff had been depending on the deposition of Johannes in the trial of said case, a prudent or careful plaintiff would have certainly kept informed as to his location or made timely effort to ascertain the location of his witness in order to enable him to take his deposition.

Points Decided.

While this court would have been fully justified in holding that the court did not abuse its discretion in case it had granted the continuance, we cannot say that he abused his discretion in refusing to grant a continuance under the facts set forth in the affidavits.

The action of the court therein and in entering a judgment of dismissal must therefore be affirmed, and it is so ordered, with costs in favor of the respondents.

Budge and Morgan, JJ., concur.

(June 5, 1915.)

HORACE M. DAVENPORT, MILTON J. FLOHR,
CHARLES W. BETTS, CHARLES F. ASP,
CHARLES W. BETTS, Administrator of the Estate
of BARRY N. HILLARD, Deceased, WILLIAM M.
CLARK, THOMAS KELLY, BEN STANLEY
REVETT and JOHN H. WOURMS, Respondents, v.
PATRICK BURKE, Appellant.

[149 Pac. 511.]

ASSIGNMENTS OF ERROR NOT DISCUSSED—MOTION FOR JUDGMENT ON
PLEADINGS—ISSUE RAISED—ERROR TO GRANT JUDGMENT.

1. Where assignments of error are set out in counsel's brief as prescribed by the rules of this court, but are not discussed either in the brief or upon oral argument, and where no authorities are cited in support of said assignments of error, the same will not be considered or determined by this court.

2. When a party moves for judgment on the pleadings he, not only for the purposes of his motion, admits the truth of all the allegations of his adversary, but must also be deemed to have admitted the untruth of all his own allegations which have been denied by his adversary. (*Walling v. Bown*, 9 Ida. 184, 72 Pac. 960, approved and followed.)

3. A judgment on the pleadings results from the fact that the answer does not put in issue any of the material allegations of the complaint, or where the pleadings show upon their face that

Argument for Respondents.

the party is entitled to recover without proof. A judgment on the pleadings is allowable not because of lack of proof, but because of the lack of an issue.

4. Where issues of fact are raised by the pleadings which require evidence to establish before the court can intelligently determine whether such issues are with the plaintiff or defendant, it is error to enter judgment on the pleadings.

5. If but one defense is good, the entire pleading cannot be deemed frivolous or subject to a motion for judgment on the pleadings.

6. Motion for judgment on the pleadings should not be granted unless it clearly appear on the face of the pleadings that there are no material issues raised by the same.

7. *Held*, under the facts in this case that there were material issues raised by the pleadings, and that it was reversible error for the trial court, upon a mere motion, to adjudge and determine the rights of the parties to this litigation without a hearing.

APPEAL from the District Court of the First Judicial District for Shoshone County. Hon. John M. Flynn, Judge.

Action for the cancellation of certain contracts to purchase mining claims, and for the possession thereof; that defendant be enjoined from interfering with plaintiffs' possession. *Reversed*.

James A. Wayne, for Appellant.

When a party moves for a judgment on the pleadings he not only admits the truth of all of the allegations of the answer, but he also admits the untruth of all of the allegations of his complaint which the defendant has by his answer denied. (*Walling v. Bown*, 9 Ida. 184, 72 Pac. 960; *Mills Novelty Co. v. Dunbar*, 11 Ida. 671, 83 Pac. 932; *Idaho Placer Min. Co. v. Green*, 14 Ida. 294, 94 Pac. 161.)

James E. Gyde and John H. Wourms, for Respondents.

Only those things are admitted by motion for judgment on the pleadings which are well pleaded and which are statements of fact and not conclusions of law. Calling a thing a fraud does not necessarily make it so. Where the denials

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of an answer are not sufficient to make an issue, the court errs in denying plaintiff's motion for judgment on the pleadings. (*Toledo etc. Scale Co. v. Young*, 16 Ida. 187, 101 Pac. 257.)

BUDGE, J.—This is an action brought in the district court of the first judicial district for Shoshone county, to cancel two certain contracts for the purchase of mining claims hereinafter referred to, and to declare said contracts null and void and not a cloud upon plaintiffs' title, and for the possession and right to the possession of said mining claims as against the defendant.

The rulings of the trial court in this case were upon issues of law raised on the pleadings. We have therefore concluded that it will not be necessary to set out in full all of the allegations of the complaint, the denials and affirmative allegations contained in the second amended answer of the defendant to the complaint. To the said amended answer, separate demurrers were filed by the plaintiffs and by the court overruled. Separate demurrers of each of the plaintiffs were filed to the second amended cross-complaint of the defendant and were by the trial court sustained, whereupon the defendant declined to amend his said second amended cross-complaint and the same was dismissed. On May 16, 1915, the plaintiffs moved the court for judgment on the pleadings, to wit, the complaint and the second amended answer, which motion was by the trial court sustained. Judgment was thereupon rendered and entered against the defendant and in favor of the plaintiffs as prayed for in plaintiffs' complaint. This is an appeal from the judgment.

It will not be necessary, for the purpose of disposing of this case, to discuss the action of the trial court in sustaining the separate demurrers of the plaintiffs to the second amended cross-complaint of the defendant, for the reason that counsel has not deemed it necessary to discuss the action of the court in this respect, although assigned as error in his brief. Where assignments of error are made in counsel's brief but not discussed either in the brief or upon oral argument, and where no authorities are cited in support of

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the assignment of error, said assignment will not be discussed by this court. (*Idaho Merc. Co. v. Kalanquin*, 8 Ida. 103, 66 Pac. 933; *Farnsworth v. Pepper*, ante, p. 154, 148 Pac. 48.)

We will confine ourselves to a discussion of the second and third assignments of error in appellant's brief, to wit, second, "The court erred in sustaining plaintiffs' motion for a judgment on the pleadings"; third, "The court erred in entering the judgment of dismissal." In order to determine whether the court erred in sustaining the plaintiffs' motion for judgment on the pleadings, and thereafter entering up judgment of dismissal, it becomes necessary to refer briefly to the allegations of the complaint, the denials and affirmative allegations of the answer.

Among other things it is alleged in the complaint of the plaintiffs that on June 3, 1912, the plaintiffs, with the exception of John H. Wourms, were the owners of certain lode mining claims situate, lying and being in Beaver mining district, county of Shoshone, state of Idaho, known as the "Amazon," "Manhattan," "Monitor," "Ajax," "Glenwood," "Staten Island," "New York" and "Merrimac" group of mining claims.

It is alleged that there were two options to purchase the above-named mining claims given to the defendant by the owners thereof, part of whom resided in Wallace, Idaho, and the others in Denver, Colorado. For the purpose of brevity the contracts will be treated and referred to in this opinion as one.

The plaintiffs allege that the consideration to be paid by the defendant under the option to purchase the mining claims referred to was \$160,000, which said amount was divided into various sums, the first payment of \$16,000 falling due on or before December 3, 1912, which amount the plaintiffs allege the defendant did not pay, and that by reason of his failure so to do plaintiffs brought this action.

The contracts marked exhibits "A" and "B," attached to and made a part of plaintiffs' complaint, among other things, provided: First, that Burke was to have the immediate possession of said property; second, that the deed con-

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veying the interest of the plaintiffs to the mining claims was to be placed in the First National Bank at Wallace, Idaho, and the First National Bank of Denver, Colorado, to be delivered to Burke upon the payment of the instalments as they became due under the contract of purchase; third, Burke, under the terms of the contract, agreed to do certain development work; fourth, it was agreed that Burke might extract and ship certain ore from said mining claims; fifth, twenty-five per cent of the net smelting returns from all shipments of ore were to be applied upon the payments; sixth, it was to be provided that all buildings and machinery placed upon the property by Burke should become the property of the owners in the event Burke did not comply with the conditions of the contracts; seventh, it was agreed that Burke should save the owners from any liens, judgments, liabilities or indebtedness of any kind or nature during the life of the agreement; eighth, that time was of the essence of the contracts; ninth, that nothing in the contract should be so construed as to compel Burke to purchase said mining claims or render him liable in damages if he failed so to do, if he finally concluded not to avail himself of the conditions of the contract.

The complaint sets forth that the plaintiffs had performed all of the things prescribed to be performed by them under the provisions of the contract, and at the time of the commencement of the suit Burke had paid \$175 on the purchase price. It is further alleged that prior to the commencement of this action the owners of the mining claims involved in this litigation gave to one John H. Wourms, who is made a respondent in this action, an option to purchase these same mining claims; that Wourms had demanded of Burke the possession of said claims, but he had refused to deliver the possession or to pay the balance due on December 3, 1912.

The plaintiffs pray that it be decreed that the defendant had violated the terms and conditions of the agreements and that said contracts be canceled and held for naught, and that the defendants be enjoined from interfering with the possession of the plaintiffs in said mining claims.

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To this complaint the defendant Burke filed a second amended answer, in which he admits the signing of the two contracts of the plaintiffs, exhibits "A" and "B," but avers that said contracts were not signed until June 17, 1912; denies that he ever assented to the terms and conditions of said contracts, exhibits "A" and "B," and alleges that in truth and in fact defendant's signature thereto was obtained by and through the false and fraudulent representations of plaintiff Charles W. Betts, who was then and there acting as the agent of all of the plaintiffs, with the exception of Flohr and Wourms, and alleges that his signature to said contracts was obtained in the following manner, and under the following conditions and circumstances, to wit, that on or about September 14, 1911, one William T. Tracy entered into a contract in writing with plaintiffs Davenport, Flohr, Betts, the estate of Barry N. Hillard, and Charles F. Asp, for the purchase of all right, title and interest of the afore-said parties in and to the mining claims described in the complaint, in which said contract the defendant was named as a party but was not interested and was only known as a nominal party thereto, which contracts with Tracy are set out *in haec verba* in the defendant's second amended answer; that on or about February 13, 1912, Tracy forfeited his contracts and thereupon plaintiffs proposed to the defendant that, if he would assume all the debts incurred by Tracy under his contracts, which amounted to about the sum of \$9,000, and would publish in the "Press Times," a newspaper published in the city of Wallace, Shoshone county, Idaho, a notice to the public that he would assume and pay all obligations and fulfill all contracts incurred or entered into by Tracy, the plaintiffs would enter into a contract or contracts with the defendant for the sale to the defendant of the mining claims referred to in the plaintiffs' complaint, for the same consideration as was required to be paid by Tracy, *and would give the defendant the same length of time after the date of said contracts within which to make said payments as had been given to Tracy*; that he accepted said offer and on or about June 17, 1912, was advised by the plaintiff Betts, who

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was then acting for himself and as the agent of all of said plaintiffs with the exception of Flohr and Wourms, that contracts drawn in accordance with the oral agreement between plaintiffs and defendant were at the First National Bank of Wallace, Idaho, and ready for defendant's signature; that said Betts then advised the defendant that the contracts were identical in terms with the contracts theretofore made between the plaintiffs and Tracy, except as to the time when payments thereunder were required to be made, which had been modified in accordance with the oral agreement between the plaintiffs and defendant; that thereupon the defendant went with the said Betts to the First National Bank of Wallace, and, without reading the said contracts, exhibits "A" and "B," but relying on the statements, assurances and representations of Betts that said contracts were identical with the Tracy contracts with the exception of the time for payments, signed his name to said contracts.

Defendant alleges that on or about April 2, 1912, he entered into possession of said mining claims pursuant to the terms of the oral agreement entered into between the plaintiffs and the defendant, and not under the terms and conditions of exhibits "A" and "B."

The defendant, for lack of sufficient knowledge or information to enable him to form a belief, denies that the plaintiffs on December 4, 1912, gave an option to Wourms to purchase said mining property, and in like manner denies any knowledge of the existence or conditions of said or any option, and alleges that if said option was given to said Wourms to purchase said mining claims, that said Wourms took said option with full knowledge of the rights claimed by the defendant.

Further answering said complaint, and by way of affirmative defense, the defendant alleges among other things that at the time Tracy forfeited his right under said contracts he, Tracy, had incurred and owed approximately \$9,000 for labor, supplies and material furnished to and used by him in prosecuting work under said contracts, which amount the defendant alleges he paid.

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The defendant further alleges that he published the notice agreed upon in the "Press Times," published in the city of Wallace; that on or about April 2, 1912, he entered upon said lode mining claims and prosecuted work thereon under said oral contract until he was enjoined in this action, which was on or about December 16, 1912; that in the prosecution of said work upon said mining claims he expended about \$30,000.

Defendant alleges that the contracts, exhibits "A" and "B," signed by the defendant and attached to and made a part of the plaintiffs' complaint were and are materially and substantially different in terms and conditions from the Tracy contract or the oral contract, among other things, in the following particulars: In the Tracy contract, the right of the holder of said contract to extract ore from said premises was limited only by the following provisions, to wit:

"It is hereby further agreed that the parties of the second part shall have the right to extract and ship any and all ore encountered during the course of development work on said property, provided, however, that the parties of the second part shall deposit to the credit of the parties of the first part at the said First National Bank an amount equal to one-fourth of the smelter returns received from such shipments, which amounts so deposited shall be applied towards the liquidation of the payments as they fall due at the time and in the manner as hereinbefore set forth."

While in the contract which this defendant alleges he was induced to sign without reading, as herein referred to, there had been inserted the following provision:

"It is hereby further agreed that the party of the second part shall have the right to mine, extract and ship any and all ore encountered during the course of development work on said property, such ore, thus encountered, not lying or contained within the boundaries of the underground workings as the same exist at the time of the execution of this agreement; the intent and meaning of this provision being that new ore bodies must be discovered during the course of development work, lying outside and exterior to the present

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boundaries of the underground workings, and from which new ore bodies the party of the second part is hereby given the right to mine, extract and ship ore, during the ordinary course of development work and in the general acceptation of that term, but no right is hereby given or granted to the party of the second part to stope upon new ore bodies, thus encountered, or mine, extract or ship any ore therefrom in any other manner than as herein provided; any ore thus mined, extracted or shipped shall be known as 'Development ore.' "

It is contended by the defendant that by reason of the fact that the contracts, exhibits "A" and "B," signed by him under the facts recited in his second amended answer contained conditions which were in many respects entirely different from the Tracy contract or oral contract under which he went into possession of said mining claims, it was impossible for him to comply with the terms and conditions of exhibits "A" and "B."

It is insisted by the plaintiffs that the defendant went into possession of said mining claims under exhibits "A" and "B," and failed to comply with the provisions of said contract. This is denied by the defendant, who insists that there were no payments due under the contract entered into between him and the plaintiffs at the time of the commencement of this action; that said payment did not fall due until February 19, 1913. While, upon the other hand, the plaintiffs insist that the first payment fell due on December 3, 1912, under exhibits "A" and "B."

It will be observed from reading the complaint and the answer in this case that there are several important issues raised by the pleadings, not only with reference to the date of payments, but the right of the defendant to extract and ship ore encountered during the course of development work on the property, and to apply the proceeds in the payment of royalties and the reduction of the indebtedness. There are issues made by the pleadings which might involve the right, title and interest in and to said mining claims of one or more, if not all of the plaintiffs; to what extent the de-

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fendant's right to act under his contract was involved by reason of subsequent contracts given to respondent Wourms, as well as the acceptance of royalties; the possession of the defendant, whether under the contract known as exhibits "A" and "B" or under an oral contract, and the question of whether or not there was a part performance which would relieve the defendant from the provisions of sec. 6007, Rev. Codes; all of which issues were conceded sufficiently well pleaded to withstand the assault of the plaintiffs' separate demurrer filed to the defendant's amended answer.

Sec. 3317, Rev. Codes, provides: "Where a contract, which is required by law to be in writing, is prevented from being put into writing by the fraud of a party thereto, any other party who is by such fraud led to believe that it is in writing, and acts upon such belief to his prejudice, may enforce it against the fraudulent party."

As was held in the case of *Walling v. Bown*, 9 Ida. 184, 72 Pac. 960: "When a party moves for judgment on the pleadings he not only, for the purposes of his motion, admits the truth of all the allegations of his adversary, but must also be deemed to have admitted the untruth of all his own allegations which have been denied by his adversary."

A judgment upon the pleadings results from the fact that the answer does not put in issue any of the material allegations of the complaint, or where the pleadings show upon their face that the party is entitled to recover without proof. In other words, a judgment on the pleadings is allowable, not because of lack of proof, but because of lack of an issue. Where issues of fact are raised by the pleadings, which require evidence to establish before the court could intelligently determine whether such issues are with the plaintiff or defendant, it is error to enter judgment on the pleadings. (*Alsbaugh v. Reid*, 6 Ida. 223, 55 Pac. 300; *Coombs v. Collins*, 6 Ida. 536, 57 Pac. 310; *Mills Novelty Co. v. Dunbar*, 11 Ida. 671, 83 Pac. 932.)

In the case of *Hicks v. Lovell*, 64 Cal. 14, 49 Am. Rep. 679, 27 Pac. 942, it was held that, "Judgment on the pleadings is

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authorized only where the answer admits or leaves undenied the material facts stated in the complaint."

In the case of *Johnson v. Manning*, 3 Ida. 352, 29 Pac. 101, it was held: "When any of the material allegations of the complaint are denied by the answer, it is error to render judgment on the pleadings." And in the case of *Swinehart v. Pocatello Meat & Produce Co.*, 8 Ida. 710, 70 Pac. 1054, the court said: "Where a material issue of fact is made by the pleadings, judgment on the pleadings constitutes reversible error."

If any one defense is good, the entire pleading cannot be deemed frivolous or subject to the motion for a judgment on the pleadings; nor does mere vagueness and uncertainty render a pleading subject to such a motion, or the pleading of evidence or legal conclusions. (31 Cyc., pp. 610, 611.) In fact, in some jurisdictions it is reversible error to grant a motion for a judgment on the pleadings, where a demurrer has been overruled. (*McCown v. McSween*, 29 S. C. 130, 7 S. E. 45.)

In the case of *De Courcey v. Cox*, 94 Cal. 669, 30 Pac. 95, the court says: "We have not overlooked the point made by appellant on the action of the court in granting the motion for judgment on the pleadings on the ground that the complaint did not state facts sufficient to constitute a cause of action, after having overruled a demurrer based on that ground. We think it nothing more serious than an irregularity which it is better to avoid as far as practicable."

As a general rule, it might be stated that a motion for a judgment on the pleadings should not be granted, unless it clearly and satisfactorily appear to the trial court that there are no material issues raised by the denials in the answer or by the affirmative allegations of the answer. To finally adjudge and determine the rights of litigants upon a mere motion without a hearing or affording a full opportunity to litigate their rights, might result in great injustice being done.

From the pleadings in this case it clearly appears that a contract was entered into between the parties to this action.

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That there was a part performance of a contract cannot be denied. Neither can it be gainsaid that the defendant while in possession of the mining claims paid off the indebtedness and expended moneys in prosecuting his work under a contract to the amount of approximately \$30,000. The court was not in a position to determine from the pleadings alone whether the false and fraudulent representations made as alleged by the defendant were binding upon one or more or all of the defendants.

Each and every allegation contained in the defendant's answer, whether a denial or an affirmative allegation, for the purposes of the motion for judgment on the pleadings, was admitted to be true by the plaintiffs, and each and every allegation of the plaintiffs' complaint that was denied by the answer was admitted to be untrue by the plaintiffs. The plaintiffs therefore admitted that the defendant entered into an oral contract, the conditions of which were exactly the same as the Tracy contract except as to the date of payments. The plaintiffs admitted the false and fraudulent representations made by the plaintiff Betts, not only in so far as they bound Betts himself, but that he was the agent of the plaintiffs and made said representations for and on behalf of the plaintiffs, whereby they all became bound, and that by reason thereof the defendant was misled as alleged in his second amended answer.

It will not be necessary to call attention to all of the issues raised by the pleadings in this case, or to comment upon the admissions of the plaintiffs, which are deemed to be true, for the purpose of a motion for judgment on the pleadings. Suffice it to say, that there are, in our opinion, material issues raised by the pleadings, and that reversible error was committed by the trial court in sustaining the plaintiffs' motion for a judgment on the pleadings.

The judgment should be reversed and the cause remanded, and it is so ordered. Costs are awarded to appellant.

Sullivan, C. J., and Morgan, J., concur.

Argument for Appellant.

(June 8, 1915.)

E. I. THERIAULT, Respondent, v. THE CALIFORNIA INSURANCE COMPANY OF SAN FRANCISCO, a Corporation, Appellant.

[149 Pac. 719.]

**FIRE INSURANCE—"WATCHMAN CLAUSE"—PROOF OF LOSS—WAIVER—
MISCONDUCT OF COUNSEL.**

1. When the insured had employed two competent watchmen and, in good faith, instructed them to carefully watch the property and to guard against fire, both by day and by night, the condition of the "watchman clause" in the policy was fully complied with on the part of the insured.

2. Regardless of the clause in a policy that no officer, agent or other representative of the insurance company shall have the power to waive any of its provisions or conditions, where other proofs than those required in the policy are accepted by an agent, authorized to adjust a loss, the company will be deemed to have waived the provisions of the policy fixing the manner of making proof of loss.

3. A judgment should never be reversed by reason of misconduct of counsel at the trial, unless the appellate court is of the opinion such misconduct had prevailing influence upon the jury to the detriment of appellant.

APPEAL from the District Court of the First Judicial District for Shoshone County. Hon. William W. Woods, Judge.

Action upon fire insurance policy. Judgment for plaintiff. *Affirmed.*

James A. Wayne, for Appellant.

"Inasmuch as an insurance adjuster has express authority to demand proofs of loss and to participate in an adjustment, his acts frequently give rise to an implied waiver from compelling the furnishing of such proofs or proceeding to enter into the business of adjustment when the insurer has knowledge of a right to forfeit the policy." (19 Cyc. 783; *Dou-*

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ville v. Pacific Coast Casualty Co., 25 Ida. 396, 138 Pac. 506; *Minneapolis Fire & Marine Mut. Ins. Co. v. Fultz*, 72 Ark. 365, 80 S. W. 576; *Stevens v. Citizens' Ins. Co.*, 69 Iowa, 658, 29 N. W. 769; *Prussian Nat. Ins. Co. v. Peterson*, 30 Ind. App. 289, 64 N. E. 102; *Germania Fire Ins. Co. v. Pitcher*, 160 Ind. 392, 64 N. E. 921, 66 N. E. 1003; *Brock v. Des Moines Ins. Co.*, 106 Iowa, 30, 75 N. W. 683.)

The provision of the policy that only a specific agreement indorsed thereon shall be construed as a waiver of any condition, and that "the agent" of the insuring company has no authority to waive any condition, does not preclude the company's adjuster from waiving a condition requiring the insured to furnish proof of loss. (*Heusinkveld v. St. Paul Fire etc. Ins. Co.*, 106 Iowa, 229, 76 N. W. 696.) The adjuster also has the authority to waive proof of loss. (*Helvetia Swiss Fire Ins. Co. v. Edward P. Allis Co.*, 11 Colo. App. 264, 53 Pac. 242; *California Ins. Co. v. Gracey*, 15 Colo. 70, 22 Am. St. 376, 24 Pac. 577; *Liverpool, London & Globe Ins. Co. v. Tillis*, 110 Ala. 201, 17 So. 672; *Slater v. Capital Ins. Co.*, 89 Iowa, 628, 57 N. W. 422, 23 L. R. A. 181; *Union Mut. etc. Ins. Co. v. Wilkinson*, 13 Wall. (U. S.) 222, 20 L. ed. 617.)

If the insured uses reasonable care and due diligence in employing competent watchmen, properly instructs them, and uses due care to see that continuous watch is kept, he complies with the terms of the policy. (*McGannon v. Michigan Millers' Mutual Fire Ins. Co.*, 127 Mich. 636, 89 Am. St. 501, 87 N. W. 61, 54 L. R. A. 739; *Burlington Fire Ins. Co. v. Coffman*, 13 Tex. Civ. 439, 35 S. W. 406; *Hanover Fire Ins. Co. v. Gustin*, 40 Neb. 828, 59 N. W. 375; *Kansas Mill Owners' etc. Ins. Co. v. Metcalf*, 59 Kan. 383, 53 Pac. 68; *Sierra M. S. & M. Co. v. Hartford Fire Ins. Co.*, 76 Cal. 235, 18 Pac. 267; *McGannon v. Millers' Nat. Ins. Co.*, 171 Mo. 143, 94 Am. St. 778, 71 S. W. 160; *Mannheim Ins. Co. v. Clarke & Co.* (Tex. Civ.), 157 S. W. 291; *Phoenix Assur. Co. v. Coffman*, 10 Tex. Civ. 631, 32 S. W. 810.)

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John P. Gray, for Respondent.

The fact that the very employment of these watchmen by the respondent required them to work at a place from which the mining plant was not visible, together with the small remuneration promised them for their services as watchmen,—entirely insufficient to justify them in keeping a continuous watch at the property, and entirely insufficient to justify respondent in thinking that such men would keep a continuous watch at the property,—shows clearly that there was no *bona fide* effort made on the part of respondent to comply with the watchman clause of this policy, and was sufficient to preclude a recovery in this case. (*Shoshone Concentrating Co. v. Hamburg-Bremen Fire Ins. Co.*, 64 Wash. 638, 117 Pac. 500; *Rankin v. Amazon Ins. Co.*, 3 Cal. Unrep. 330, 25 Pac. 260, 89 Cal. 203, 23 Am. St. 460, 26 Pac. 872; *Wenzel v. Commercial Ins. Co.*, 67 Cal. 438, 7 Pac. 817; *McKenzie v. Scottish Union etc. Ins. Co.*, 112 Cal. 548, 44 Pac. 922; *Kentucky Vermillion M. & C. Co. v. Norwich Union Fire Ins. Co.*, 146 Fed. 695, 77 C. C. A. 121; *Ripley v. Aetna Fire Ins. Co.*, 30 N. Y. 136, 86 Am. Dec. 362; *First Nat. Bank v. President etc. Ins. Co.*, 50 N. Y. 45; *Blumer v. Phoenix Ins. Co.*, 45 Wis. 622.)

MORGAN, J.—On July 25, 1913, appellant, in consideration of \$45, issued and delivered to respondent its certain policy of fire insurance in the sum of \$1,500, whereby it insured for a period of one year a certain building together with mining and power machinery, tools, equipment, household goods and supplies therein contained, being the property of respondent. Another policy in the sum of \$1,500 was written by the Springfield Fire and Marine Insurance Company of Springfield upon the same property, and these policies were so drawn that the loss, if any occurred, would be apportioned between the companies. On the 23d day of August, 1913, the combustible portion of the insured property was destroyed, and the incombustible portion was more or less damaged, by fire.

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An action upon the policy in this case was commenced and it was alleged in the complaint that respondent's loss, due to the destruction of the property covered by the two policies, amounted to \$2,737.30. Judgment was prayed for against the appellant in the sum of \$1,368.65 and the trial resulted in a verdict and judgment in favor of respondent and against appellant in the sum of \$1,258.23, from which judgment this appeal has been prosecuted.

The assignment of errors contains twenty-four specifications, which may be grouped under four heads:

1. The action of the court in denying the motion for a non-suit and in denying the motion for a directed verdict, which motions were made upon the grounds that the provisions of the policy with reference to keeping a watchman upon duty and with reference to rendering written and verified proof of loss within sixty days had not been complied with by respondent.

2. The action of the court in giving certain instructions to the jury relative to waiver of notice and verified proof of loss, upon the ground that respondent, as contended by appellant, relied upon a compliance with the provisions of the policy and not upon a waiver thereof.

3. The action of the court in instructing the jury relative to the watchman clause in the policy, it being contended by the appellant that the court misdirected the jury as to the law applicable thereto.

4. The action of the court in permitting counsel for respondent to make remarks in the presence of the jury which, it is contended by appellant, were prejudicial to its rights and amounted to misconduct upon the part of respondent's counsel.

The respondent is the owner of a mine in the operation of which the insured property was used. A few days before the fire work at the mine and power-house was suspended and respondent went to his home at Avery, Idaho, about eight miles distant from the property in question. Before going he employed two men, Pressie and Snyder, to act as watchmen, agreed to pay them a dollar a day each for their services

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in that behalf, and instructed them to keep continual watch and to be very careful in regard to fire. There was a quantity of debris in the tunnel of the mine and respondent also employed Pressie and Snyder to remove it, agreeing to pay them the sum of \$10 for that work.

The insured property was located about 300 feet from the portal of the tunnel and about 1,000 feet from the cabins where the men lived and could not be seen either from the tunnel or the cabins. The fire occurred about noon while the men were at their cabins at dinner.

The policy contains the following clause:

"It is warranted by the insured that whenever any of the following named parts of the plant described in this policy, to wit: power-house, is idle or not in operation from any cause whatsoever, competent watchmen shall be employed and due diligence used to keep a continuous watch both day and night in and immediately about said part of the plant. If any of the above-named parts is idle or not in operation for a period of more than thirty (30) days without the written consent of this company, this policy shall be void."

It is not contended by appellant that the men who were employed as watchmen were incompetent, but it is earnestly urged that their employment to clean out the tunnel was inconsistent with their employment as watchmen; that they could not fulfill their contract to remove the debris from the tunnel and continuously watch the insured property. The testimony does not bear out this contention. The work in the tunnel was not of such a nature as to require the presence of both men (the testimony shows that the material was removed with a wheelbarrow); neither was the job of such magnitude as to require the absence of either of them from the insured property for a great length of time. Snyder testified on cross-examination as follows:

"Q. How many days after Mr. Theriault left did you and Mr. Pressie work together in the tunnel?

"A. Oh, just as it happened; might work there an hour or so, you know, kept fussing around, not hired—we could take

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our time. We could have taken it out in a day working the four hours.”

Numerous decisions have been cited by both appellant and respondent to assist the court in construing what is known as the “watchman clause” in a policy of insurance. While there appears to be considerable conflict of authority upon this point, a careful examination of the decisions will demonstrate that the conflict is more apparent than real and that the question presented is one of fact rather than of law. In the case of *Rankin v. Amazon Ins. Co.*, 89 Cal. 203, 23 Am. St. 460, 26 Pac. 872, cited by appellant, wherein it was held that the requirements of the “watchman clause” in an insurance policy had not been complied with, the court said:

“It is not a case of mere negligence. If a loss is occasioned by the mere fault or negligence of the watchman, unaffected by fraud or design on the part of the insured, it is within the protection of the policy; but, to entitle the insured to recover, it must appear that he has in good faith employed a watchman to perform the duties required by the terms of the warranty.”

In case of *McGannon v. Millers’ Nat. Ins. Co.*, 171 Mo. 143, 94 Am. St. 778, 71 S. W. 160, it is said:

“Under the contract in question, did the insured warrant that the watchman would never neglect his duty? It is no defense to a suit on a fire policy that the fire resulted from the negligence of the insured. Negligence or carelessness is one of the risks insured against, and negligence of the watchman is, in fact, all that can be made out of this point.”

The court, in case of *Burlington Fire Ins. Co. v. Coffman*, 13 Tex. Civ. 439, 35 S. W. 406, said:

“Upon very plain principles, the courts, while requiring a strict compliance with a warranty in insurance contracts, will not exact performance beyond its terms. What was required in this instance was that the insured should keep a watchman on duty upon the premises at night. The agreement was complied with when he employed and kept such a servant upon the premises as a night watchman, provided he exercised reasonable care in the selection and retention of the

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person for that employment. . . . A failure to comply with the provisions would, we think, have existed, if it had been shown that the insured had notice of any unfitness of the watchman, or had not observed ordinary care in employing and keeping him." (See, also, *Sierra M., S. & M. Co. v. Hartford Fire Ins. Co.*, 76 Cal. 235, 18 Pac. 267; *McGannon v. Michigan Millers' Mutual Fire Ins. Co.*, 127 Mich. 636, 89 Am. St. 501, 87 N. W. 61, 54 L. R. A. 739; *Kansas Mill Owners & Mfgs. Mut. Fire Ins. Co. v. Metcalf*, 59 Kan. 383, 53 Pac. 68; *Hanover Fire Ins. Co. v. Gustin*, 40 Neb. 828, 59 N. W. 375; *Phoenix Assur. Co. v. Coffman*, 10 Tex. Civ. 631, 32 S. W. 810.)

The jury was amply justified in finding from the evidence in this case that respondent, in good faith, employed two competent watchmen and instructed them to carefully watch the property and guard against fire, both by day and by night, and that their other employment was not of such a nature as to interfere with the full and complete discharge of their duties in that behalf. Having done this the condition of the "watchman clause" in the policy was complied with on respondent's part.

The contention of counsel for appellant that the court erred in instructing the jury relative to waiver of notice and verified proof of loss for the reason that respondent relied upon a compliance rather than upon a waiver of the provisions of the policy with respect thereto, also that the adjuster was not authorized to waive the requirements of the policy relative to notice and proof of loss, does not appear to us to be meritorious.

In paragraph 10 of the complaint it is alleged, after stating that the respondent made out an inventory of the property which was destroyed by fire and delivered it to one Partridge, who was the agent and adjuster and officer of appellant, that after Partridge had examined pictures of the buildings and machinery and had viewed the ruins of the property where the fire occurred, he, the respondent, inquired of Partridge whether there were any other or further documents or papers which he should prepare or any other or

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further notices which he should give or anything which he should do in addition to what he had already done in connection with making proof of loss, and it is further alleged: "The said Partridge thereupon stated that the plaintiff need not give any other or further notice or proof of loss and that the documents and papers and notices which the plaintiff had already given were ample and sufficient and thereupon expressly waived to this plaintiff the giving of any other or further notice of proof of loss, and that the notice and proof already furnished was all that was necessary and was in itself sufficient. . . . " While there is conflict in the evidence as to what took place between respondent and the adjuster, there is sufficient testimony to fully sustain the allegations of said tenth paragraph of the complaint.

The policy contains the usual provision that no officer, agent or other representative of the insurance company shall have power to waive any of its provisions or conditions, and provides that the insured "within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and all others in the property; the cash value of each item thereof and the amount of loss therein; all encumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; and changes in the title, use, occupation, location, possession, or exposure of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire. . . . "

Regardless of the clause in a policy that no officer, agent or other representative of the insurance company shall have power to waive any of its provisions or conditions, where other proofs than those required in the policy are accepted by an agent, authorized to adjust a loss, the company will be deemed to have waived the provisions of the policy fixing the manner of making proof of loss.

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This court said in the case of *Southern Idaho Conference Assn. of Adventists v. Hartford Fire Ins. Co.*, 26 Ida. 712, 145 Pac. 502, as follows:

"The record shows that the proof of loss was not made within sixty days after the fire, and the question will be presented on a retrial as to whether the failure to make such proof precludes a recovery in this case. The evidence offered showing or tending to show a waiver by the company of making the proof of loss within the sixty days ought to be received on the trial."

In case of *Queen of Arkansas Ins. Co. v. Laster*, 108 Ark. 261, 156 S. W. 848, it was said:

"When appellant's adjuster, in response to appellee's inquiry, said that he had 'all the proof he wanted,' this was a waiver of any further proof of loss on the part of appellant, notwithstanding the nonwaiver agreement. It was equivalent to saying to the appellee that appellant was satisfied as to his loss and had all the information pertaining thereto that appellant desired."

In case of *Ohio Farmers' Ins. Co. v. Glaze* (Ind. App.), 101 N. E. 734, it is said:

"A stipulation in a policy that 'no agent has power to waive any condition of this contract unless by written indorsement thereon' refers to conditions essential to make the contract obligatory and binding between the parties in the first instance, and to its continuing force and obligation till loss occurs, but does not refer to stipulations requiring the assured to make proof of loss in a special manner, and such stipulations may be waived by an agent without indorsement.

. . . .

"Although an insurance policy on its face prohibits any agent from waiving any of its conditions where other proofs than those required in the policy are accepted by an agent of the company, duly authorized to act with reference to that subject, the company will be deemed to have waived the proof required by the policy." (See, also, *Stevens v. Citizens' Ins. Co.*, 69 Iowa, 658, 29 N. W. 769; *Prussian Nat. Ins. Co. v. Peterson*, 30 Ind. App. 289, 64 N. E. 102; *Germania Fire Ins.*

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Co. v. Pitcher, 160 Ind. 392, 64 N. E. 921, 66 N. E. 1003; *Brock v. Des Moines Ins. Co.*, 106 Iowa, 30, 75 N. W. 683; *Minneapolis Fire & Marine Mut. Ins. Co. v. Fultz*, 72 Ark. 365, 80 S. W. 576; *Hanover Fire Ins. Co. v. Gustin*, *supra.*)

The action of the trial court in permitting counsel for respondent to make certain remarks in the presence of the jury is assigned as error, and it is contended that these remarks were prejudicial to the rights of appellant and amounted to misconduct upon the part of respondent's counsel. A careful examination of the record has convinced us that the conduct of counsel complained of did not prejudice the cause of appellant in the minds of the jurors. While judgments have been reversed by reason of the misconduct of counsel at the trial, this should never be done unless the appellate court is of the opinion such misconduct had prevailing influence upon the jury to the detriment of appellant.

We find no error in the record and the judgment is therefore affirmed. Costs are awarded to respondent.

Sullivan, C. J., and Budge, J., concur.

(June 8, 1915.)

E. I. THERIAULT, Respondent, v. SPRINGFIELD FIRE
AND MARINE INSURANCE COMPANY OF SPRING-
FIELD, a Corporation, Appellant.

[149 Pac. 722.]

Action upon fire insurance policy. Judgment for plaintiff.
Affirmed.

James A. Wayne, for Appellant.

John P. Gray, for Respondent.

Points Decided.

See briefs in *Theriault v. California Ins. Co.*, ante, p. 476.

This is an action upon the policy of insurance mentioned in case of *Theriault v. California Ins. Co. of San Francisco*, ante, p. 476, 149 Pac. 719, written to insure the same property covered by the policy in that case. The two cases were consolidated for trial in the district court. Judgment was awarded in favor of respondent against this appellant in the sum of \$1,258.23, from which this appeal was prosecuted. By stipulation of counsel the cases were consolidated for the purpose of appeal.

The facts in the two cases are identical, and upon the authority of the said case of *Theriault v. California Ins. Co. of San Francisco*, supra, the judgment in this case is affirmed. Costs are awarded to respondent.

(June 9, 1915.)

LEONARD RUBLE et al., Appellants, v. JOHN BUSBY,
Respondent.

[149 Pac. 722.]

COMPLAINT — PHYSICIAN AND SURGEON — MALPRACTICE — NEGLIGENCE —
SKILL — EVIDENCE — INSTRUCTIONS.

1. Where an action is brought to recover damages on account of the wrongful, negligent and careless leaving of a sponge in the abdomen of a patient, and on account of the negligence of defendant in permitting said sponge to remain in said patient's abdomen an intestinal obstruction was created, resulting in a partial closing of a portion of the intestinal canal and causing a partial paralysis and obstructions thereof, and by reason of such wrongful and negligent acts and for no other reason and as a direct result thereof the patient died, it is incumbent upon the plaintiff to prove said allegations by a preponderance of the evidence and show that the presence of said sponge in the abdomen of the patient was the direct and proximate cause of the death of the patient.

2. Held, that the evidence is sufficient to show that the adhesive condition of the intestines of the patient caused her death and that

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such adhesive condition was not caused by the presence of a sponge, and that the evidence is sufficient to support the verdict of the jury.

3. *Held*, that the court did not err in giving or refusing to give certain instructions.

4. *Held*, that the court did not err in refusing to admit certain evidence.

APPEAL from the District Court of the Eighth Judicial District for Kootenai County. Hon. Robert N. Dunn, Judge.

Action to recover damages for alleged carelessness and negligence in leaving a sponge in the abdomen of a patient, which caused her death. Judgment for defendant. *Affirmed*.

John P. Gray and Frank M. McCarthy, for Appellants.

Plaintiffs' requested instruction No. 5 correctly stated the law in a case of this kind, and it was clearly erroneous for the court to refuse to give that instruction and to shift the burden upon the plaintiffs. In a great number of cases heretofore decided this instruction has been approved and the law there laid down has been held to be the correct rule of law governing a case of this character. (*Harris v. Fall*, 177 Fed. 79, 100 C. C. A. 497, 27 L. R. A., N. S., 1174; *Wharton v. Warner*, 75 Wash. 470, 135 Pac. 235; *Jones v. Tri-State Tel. & Telg. Co.*, 118 Minn. 217, 136 N. W. 741, 40 L. R. A., N. S., 485; *Zilke v. Johnson*, 22 N. D. 75, Ann. Cas. 1913E, 1005, 132 N. W. 640; *Reynolds v. Smith*, 148 Iowa, 264, 127 N. W. 192; *Akridge v. Noble*, 114 Ga. 949, 41 S. E. 78; *Gillett v. Tucker*, 67 Ohio St. 106, 93 Am. St. 639, 65 N. E. 865; *Palmer v. Humiston*, 87 Ohio St. 401, 101 N. E. 283, 45 L. R. A., N. S., 640.)

The burden was upon the surgeon in an action for malpractice to show that the leaving of a sponge in the body of a patient was not due to his negligence, and the burden was upon him to prove that he was not negligent in leaving it there. (*Samuels v. Willis*, 133 Ky. 459, 118 S. W. 339, 19 Ann. Cas. 188.) Instruction No. 3 given by the court was erroneous for the reason that it was contrary to the rule of law laid down in *McGraw v. Kerr*, 23 Colo. App. 163, 128

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Pac. 870. (*Coleman v. Wilson*, 85 N. J. L. 203, 88 Atl. 1059.)

By instruction No. 11 the court invades the province of the jury for the reason that it was for the jury to say and not the court as to what proximately caused the death of Mrs. Ruble. (*Fleenor v. Oregon Short Line Ry. Co.*, 16 Ida. 781, 102 Pac. 897; *Pilmer v. Boise Traction Co.*, 14 Ida. 327, 125 Am. St. 161, 94 Pac. 432, 15 L. R. A., N. S., 254.)

Black & Wernette and C. L. Heitman, for Respondent.

Instruction No. 3, as given by the court, correctly states the law applicable to this case. (*Samuels v. Willis*, 133 Ky. 459, 118 S. W. 339, 19 Ann. Cas. 188; *Whitesell v. Hill*, 101 Iowa, 629, 70 N. W. 750, 37 L. R. A. 830, and cases cited in note; *Force v. Gregory*, 63 Conn. 167, 38 Am. St. 371, 27 Atl. 1116, 22 L. R. A. 343; *Dorris v. Warford*, 124 Ky. 768, 100 S. W. 312, 9 L. R. A., N. S., 1090, 14 Ann. Cas. 602.)

There can be no recovery if no injury resulted from the act of the physician. (*Craig v. Chambers*, 17 Ohio St. 253.)

The plaintiff must show, not only that the physician was negligent or unskillful, but also that the injury resulted from such neglect or unskillfulness. (*Ewing v. Goode*, 78 Fed. 442.)

The burden is on the plaintiff to show that the injury resulted from the negligence of the physician. (*Chase v. Nelson*, 39 Ill. App. 53.)

Where the evidence on material facts is conflicting or where on undisputed facts reasonable and fair-minded men may differ as to the inference and conclusion to be drawn, or where different conclusions might reasonably be reached by different minds, the question of negligence is one of fact to be submitted to the jury. (*Fleenor v. Oregon Short Line*, 16 Ida. 781, 102 Pac. 897.)

SULLIVAN, C. J.—This action was brought by Ruble, the surviving husband of Dollie May Ruble, and John Grove, the surviving father of decedent, against the respondent, who is a practicing physician at Coeur d'Alene, for malpractice and negligence, and it is alleged that the negligence on the

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part of the respondent caused the death of Dollie May Ruble

It is alleged that in performing a surgical operation on said deceased to remove the ovaries, Fallopian tubes and vermiform appendix the defendant negligently permitted a gauze or cheese-cloth sponge to remain in the abdomen of the decedent at the conclusion of said operation, and that the negligent leaving of said sponge, as aforesaid, directly resulted in the death of said patient.

In his answer the respondent denied that he negligently or in any manner or at all left the alleged sponge or any sponge in the abdomen of said patient and denied that said sponge being so left or permitted to remain in the abdomen of said Dollie May Ruble was the direct cause of her death, and denied specifically all allegations of negligence in the performance of the operation, as charged in the complaint, and as an affirmative answer and defense alleged the facts as to his education, qualifications, training and experience as a medical practitioner, and recites further facts with reference to the said operation and his dismissal from the case on the ninth day after the operation.

Upon the issues thus made the cause was tried by the court, with a jury and a verdict was rendered against the plaintiffs and in favor of the defendant, and judgment was entered accordingly. A motion for a new trial was denied and the appeal is from the judgment and order denying a new trial.

The assignments of error are based on the action of the court in entering judgment and in denying the motion for a new trial, and the giving and refusing to give certain instructions, and also in refusing to admit certain offered evidence.

Appellants state in their brief that there is very little controversy regarding the facts and very little conflict in the testimony of the case, while it is contended by counsel for respondent that upon the principal issue made by the pleadings the evidence is very conflicting.

The record shows that the defendant has been a practicing physician and surgeon for twenty-three years and is a graduate of McGill University, Montreal, Canada, and that that school is a well-recognized medical institution; that he has

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taken several post-graduate courses in the leading medical institutions of the country, and that he has been engaged in the practice of his profession as a general practitioner and surgeon for twelve years in Idaho.

The following facts appear from the record :

The respondent was first consulted by Mrs. Ruble, the decedent, and who will hereafter be referred to as the decedent or patient, on October 21, 1911, concerning her malady for which the operation in question was performed. At that time and at the time of the subsequent consultations, she had an anaemic complexion, was emaciated and extremely nervous. She informed the respondent that several years prior to said consultation she had an attack of inflammation of the bowels and peritonitis lasting for several weeks and that she had never been well since; that she had trouble all the time with constipation. The respondent made an examination of the decedent and then advised her that she could not obtain relief until an operation was performed to remove the pus tubes. She informed respondent at that time that other physicians had also advised an operation. She again visited respondent on February 23, 1912, when her physical condition and appearance were about the same as at the first examination. She again consulted respondent on March 9, 1912, and her condition was about the same, and again on May 4, 1913. At that time she stated to respondent that she desired to have an operation performed. On the 6th or 7th of May, 1913, she again consulted respondent and again informed him that she desired to have the operation performed. The matter was thereafter explained to the appellant Ruble and he informed the respondent that he left the matter wholly with the decedent. The decedent arranged to go to the Coeur d'Alene Hospital for the operation, and went there on the evening of May 14, 1913, when the usual preliminary precautions were taken. Doctors Hunter and Dwyer, two regular practicing physicians of Coeur d'Alene, assisted in the operation.

It is not contended that respondent was guilty of any negligence in the performance of said operation, with the excep-

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tion that he was negligent in that he failed to remove one of the sponges used in said operation from the abdomen of the decedent.

Respondent in his testimony states the condition in which he found the intestines and all of the organs in that part of the abdomen. He found them all bound together by adhesions and testified as follows:

“In this mass of adhesions on the right side there was a loop of the small intestine that came down and was connected into this mass of adhesions. That showed positively in the first place where the attack of peritonitis that Mrs. Ruble had eight years ago originated from. It originated from the ruptured tube and the tube ruptured was the right tube of the ovary. By this attack of inflammation of the bowels, part of the bowels had become caught in the adhesions and had remained there from the time she had this attack of peritonitis until she had this operation.”

Witness then testifies that he loosened and broke up said adhesions. But, as before stated, there is no negligence charged as to the performance of said operation except that of not removing said sponge.

After the operation had been performed and the incision was about to be closed, Dr. Dwyer said to the respondent in a low voice that the nurse had reported that a sponge was missing. The respondent testified that he did not hear the nurse make the statement but heard what Dr. Dwyer said, and testified as follows:

“I stopped right then and went over this abdomen carefully, I went over every part of the abdomen; and there was no occasion for any sponge to be in that abdomen at all, but I went—now, remember the bowels in that woman were in a horizontal position as bowels naturally come down and filled the pelvis—filled the lower part of the pelvis and resumed their natural position. I put my hand down and went over the pelvic region—went over the lower part of the abdomen and satisfied myself positively that there was no sponge there. I said to Dr. Dwyer, ‘I know there is no sponge

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there.' I took sufficient time; there was no occasion to be in a hurry. . . . After I satisfied myself positively that there was no sponge there, I proceeded to close the abdomen in the usual way. . . . There was no sponge used in the abdomen unless it had a forceps attached."

"Q. You used forceps that day on every small mop or sop sponge you inserted in that abdomen?

"A. Yes, it was necessary to do so if you are going to use sponges at all. If you put a sponge in with your hand—if you have the sponge in your fingers it naturally would obstruct the view; it was necessary to use forceps on the sponges because you could not see what you were doing if you used your hand.

"Q. What was the size of those forceps attached to this mop sponge?

"A. The regular sponge forceps. The sponge forceps used at this hospital; we had two pairs of sponge forceps; they are about 15 inches long; they are the long (Young?) forceps with the Smith opening."

Dr. Dwyer, who assisted in the operation, testified on this point as follows:

"Q. Did Dr. Busby, on the day of this operation, use any of these small sponges without their being used by means of one of these forceps, as you have explained?

"A. None inside of the abdominal cavity.

"Q. If he used them, where did he use them without being fastened to forceps?

"A. On the outside of the abdominal cavity entirely.

"Q. In what part of the operation?

"A. During the opening of the abdominal wall and during the removal of the appendix, when it was brought up outside of the abdomen.

"Q. Did Dr. Busby, at the time of the performance of this operation, at any time place one of these small sponges inside of the abdominal cavity of Mrs. Ruble and leave it there for any length of time?

"A. He did not.

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"Q. Did he place one of this kind of sponge in the abdomen of Mrs. Ruble at any time without it being clamped to one of these forceps?

"A. He did not.

"Q. Was your position and were your duties such that you would see what he was doing?

"A. I could see everything and did see everything, I believe."

Dr. Dwyer also testified that the nurse reported about or at the time the incision was about to be closed up that there was one sponge short, and that he did not think the respondent heard what the nurse had said and he, Dwyer, repeated it to him. At that time the operation was practically completed with the exception of closing the incision. Dr. Dwyer further testified as follows:

"Q. State what was done by you or Dr. Busby after that time, after the sponge was reported missing.

"A. Dr. Busby inserted his hand in the abdominal cavity and made a thorough search.

"Q. State what he did.

"A. He made a search of the entire field of operation. All through the pelvic cavity as far as I could see from the position of his hand, he went entirely over the field that had been operated on.

"Q. If you know, how much time did he consume in doing that?

"A. I don't know exactly; probably three to five minutes."

Dr. Dwyer also testified that he was watching Dr. Busby as he was making the search after the sponge had been reported missing and that Dr. Busby made a careful search for it.

The evidence also shows that the patient had been on the operating table about an hour and three-quarters at the time the incision was closed.

The operation was performed on the morning of the 15th of May, 1913, and the evidence shows that the patient continued to do fairly well up to the 24th of May, when the

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respondent was unceremoniously dismissed from the case and Doctors Scallon, Shephard and Dorland took charge of the case, and on the morning of the 25th of May Dr. Dorland, assisted by Doctors Shephard and Scallon, performed a second operation upon the decedent, they having prior to that time learned that a sponge was missing that was used during the first operation. They performed the operation by making an incision in the same place it was made at the first operation. They used a number of sponges in this second operation. Immediately after the incision was made Dr. Dorland inserted his hand in the incision and made a search for the lost sponge, and after making a careful search was unable to find it. Then Dr. Shephard inserted first one hand and then the other in the incision and made a careful search for the sponge and failed to find it; then Dr. Dorland inserted his hand again in the incision and made a careful search and failed to find the sponge, and then not satisfied, Dr. Shephard made another search and testified that he found a sponge.

Thus it appears that Doctors Shephard and Dorland made five distinct searches before it is claimed they found said sponge, Dr. Shephard having made one search with one hand and when he made the second search he used first one hand and then the other. Dr. Shephard testified that said sponge was about two-thirds of the size of one's fist. It no doubt seemed remarkable to the jury that five careful searches for a substance of that size in the cavity of an abdomen would need to be made in order to find said sponge, and while the testimony of appellants shows that Dr. Shephard finally discovered the sponge, the jury evidently did not believe that testimony, or if they did believe that the sponge was found, they did not believe that that was the proximate cause of decedent's death, and may have come to the conclusion that the five searches made, covering a considerable period, might have contributed greatly to the cause of her death.

It is sufficient to say that Dr. Busby testified that after the nurse reported the sponge missing, he made a most careful examination and satisfied himself positively that there was no sponge there. And it further appears that no sponge was

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used in the abdomen unless it had forceps, about fifteen inches in length, attached to it.

Some of the physicians who were witnesses in the case testified that in their opinion the proximate cause of the death of the decedent was the leaving of the sponge in the abdomen, while others testified that in their opinion the proximate cause of her death was the adhesions of the intestines, and so far as the evidence is concerned, it is amply sufficient to sustain the verdict of the jury.

In the brief of appellants it is stated as follows: "The appellants in presenting this case to the court intend to confine their argument to a discussion of the legal principles involved, rather than to a discussion of the facts in the case"; they then proceed to argue that certain instructions requested and refused by the court contained the correct rules of law as applicable to this case, and that those instructions given by the court were contrary to the law as laid down by the decisions of other courts. The instructions requested and refused were to the effect that it was malpractice and negligence *per se* to leave a sponge in the abdomen of a patient after closing the incision, and when that fact was shown, it devolved upon defendant to show that the sponge was not the proximate cause of the patient's death.

In the complaint, after charging negligence on the part of respondent in leaving the sponge in the abdomen of the decedent, in paragraph 11 it is alleged as follows:

"That on account of the defendant so wrongfully, negligently, unlawfully and carelessly leaving said sponge in the abdomen of said patient and so inclosing the same, and on account of the negligence of the defendant in so permitting said sponge to remain as aforesaid in the said patient's abdomen upon and during the days and each of the days aforesaid, to wit, on and between the 15th day of May, 1913, to and including the 25th day of May, 1913, an intestinal obstruction was created and negligently permitted by defendant to be maintained in the body of said patient caused by the presence of said sponge, resulting in a partial closing of a portion of the intestinal canal, and causing a partial paraly-

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sis and irritation thereof, preventing the normal passage of intestinal contents through such canal, and that by reason of the wrongful, unlawful, careless, negligent and unskillful acts of the defendant as hereinbefore stated, and because of no other reason and as a direct result thereof, the said Dollie Ruble died intestate on the 3d day of June, 1913.”

It was necessary under those allegations to prove that the respondent left or permitted said sponge to remain in the abdomen of the patient, by reason of his carelessness, negligence or lack of proper skill or care, and it was also incumbent upon appellants, under those allegations, to prove that the presence of the sponge alleged to have been left or permitted to remain in the abdomen of the patient was the direct or proximate cause of the death of the patient.

Plaintiffs’ requested instruction No. 5, which was refused by the court, and of which appellants apparently complain most seriously, did not contain a statement in connection with it regarding the sponge being the cause of the death of the patient, hence if the requested instruction were correct in so far as it goes, it would not have been a proper instruction to give under the pleadings and facts and evidence in the case, for the reason that it was incumbent upon appellants to prove, in addition to the leaving of the sponge, that the leaving of the sponge was the direct and proximate cause of the death of the patient. Said requested instruction No. 5 is as follows:

“The court instructs the jury that it is ordinarily malpractice to leave a gauze or cheese-cloth sponge in the body of a patient when closing the incision after an operation, and in this case, if you find from the evidence that the defendant did leave a gauze or cheese-cloth sponge in the body of Dollie May Ruble when closing the incision after the operation, which the evidence shows that he performed upon her, the burden is upon the defendant to show that the so leaving of said gauze or cheese-cloth sponge in her body after said operation was not negligence.”

Appellant cites several cases in support of the correctness of said requested instruction, among them *Harris v. Fall*,

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177 Fed. 79, 100 C. C. A. 497, 27 L. R. A., N. S., 1174. On a careful reading of that case, we do not think it supports the contention of appellant. In fact, it simply holds that whether or not the operating physician was negligent was a question for the jury to determine. Other cases are cited by appellants, but on an examination of them we think they are clearly distinguishable from the case at bar.

In this case the evidence shows what the respondent did in the way of determining whether or not any sponge was actually left remaining in the abdomen of the patient. His testimony is corroborated by the testimony of Dr. Dwyer, which shows that great care was used on the part of respondent. This is a case where the defendant did offer evidence showing the exercise of the care and skill which ought to be exercised by an operating physician in a case like this. The instructions to the jury ought to conform to the facts and evidence as produced on the trial. In the instant case the defendant met by evidence every charge of negligence made against him, and showed the degree of care and skill that he exercised, and it would have been erroneous for the court to instruct the jury, under the evidence, as requested by appellants.

The jury was called upon to determine from the evidence whether the proximate cause of the death of the patient was the negligence of the respondent in the performance of said operation, and it devolved upon the plaintiffs to prove the material allegations of the complaint by a preponderance of the evidence, and the court correctly instructed the jury that in order for the plaintiffs to recover, they must satisfy the jury by a preponderance of evidence as to the justice of their claim; that they must produce evidence in support of the material allegations of the complaint, which in the judgment of the jury outweighs the evidence of the defendant. In other words, if the testimony was evenly balanced, they must find for the defendant, and the plaintiffs could recover only in case their testimony outweighed that of the defendant. One of the allegations of the complaint was that the respondent negligently and carelessly left in the abdomen of the

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decedent a certain sponge which caused her death, and it was necessary for them to prove that the result of the alleged negligence was the cause of the death of the patient in order to recover in this case.

Upon a careful review of the instructions given, we are satisfied that they fairly cover the case made by the pleadings and the evidence, and that there was no error in refusing to give certain instructions requested by plaintiffs, or in the giving of certain instructions by the court.

The appellants specifically complain of an alleged error committed by the court in his ruling on the evidence, which was to the effect that the court refused to permit the plaintiff Ruble to prove on rebuttal a conversation which he claimed took place between the respondent and himself about a week prior to the operation, to the effect that the respondent stated that the patient was in excellent condition to submit to an operation. This identical conversation was gone into by appellants in their direct testimony when practically the identical question was asked and the conversation testified to by the plaintiff Ruble.

We cannot see the materiality of this evidence, since negligence is not charged by reason of the performance of the operation when the patient was not in a physical condition to undergo the operation, but by reason of negligence in the performance of the operation in leaving the sponge in the patient's abdomen. The respondent produced competent evidence to show that the death of decedent was caused by intestinal obstructions caused by intestinal adhesions, commonly known in surgery as post-operative adhesions. On cross-examination respondent proved by witness Shepard that these adhesions of this particular kind of intestinal obstruction are frequent following operations, and that they are feared by physicians and not necessarily caused by foreign substances being present, but are caused, among other things, by raw surfaces of the intestines coming together, which raw surfaces are sometimes caused where old adhesions have been broken up in the performance of an operation. Dr. Shepard testified that he had never had but three cases where there

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were post-operative intestinal obstructions, and in each case the patient died.

Doctors Dorland and Shepard both testified that when they performed the operation where they claim to have found the sponge, the intestines were all matted together with intestinal adhesions, and that they loosed them in performing this operation, and that when they performed the post-mortem examination ten days later, the adhesions had reformed. It is thus made to appear that after Doctors Dorland and Shepard performed their operation the adhesions again formed and clearly appeared when the post-mortem examination was held. They testified that in their opinion the sponge caused the adhesions. On the other hand, respondent showed by a number of physicians that post-operative adhesions are very common following operations of this kind and that they produce intestinal obstructions which cause death, and the symptoms in this case indicated that the death of the patient was caused by an intestinal obstruction produced by post-operative adhesions, and that even if a sponge had been left in the manner this one was alleged to have been left, it would not have produced the symptoms present.

All of this evidence was presented to the jury under instructions given by the court, which were practically to the effect that if the jury found that the defendant had carelessly or negligently or through failure to exercise ordinary care and skill left a sponge in the said patient which caused her death, then the verdict should be for the appellants.

It is apparent from the evidence in the case that the patient after having been operated on and her intestines found to be one adhesive mass and the adhesions separated, and ten days after another operation was performed when five careful searches were made through her intestines for a sponge that was supposed to be lost and her intestines found at that time to be again an adhesive mass, and the adhesions again broken up and the intestines separated, the jury was fully justified in finding under such evidence in favor of the defendant.

Points Decided.

We find no reversible error in the record and the judgment must be affirmed, and it is so ordered, with costs in favor of the respondent.

Budge and Morgan, JJ., concur.

(June 10, 1915.)

STATE, Respondent, v. J. J. BOUCHARD, Appellant.

[149 Pac. 464.]

IMPEACHMENT OF WITNESS—GENERAL REPUTATION—STRIKING OF TESTIMONY—DISCRETION OF COURT—INSTRUCTIONS TO JURY—DISCUSSION OF ERRORS—WEIGHT OF EVIDENCE.

1. Where a witness, having stated that the reputation of the complaining witness for truth, honesty or integrity in the community where he resided was bad, was asked, "In view of that reputation, would you believe him under oath?" in the absence of a proper foundation having been laid to show that the witness was in possession of such knowledge as would make him a competent witness to answer such question, it was not error for the court to refuse to permit the witness to answer.

2. Whether such a question is a proper one under the statutes of this state, *quære*.

3. *Held*, that in view of all the evidence in this case the action of the trial court in striking out a portion of the testimony of witness Trummel who, after testifying that the reputation of the complaining witness in the community of St. Maries was bad, upon cross-examination and apparently not responsive to the question, recited street gossip and conversations overheard by him of particular acts of bad conduct of the prosecuting witness, was not prejudicial error, the right to strike such testimony being largely within the sound discretion of the trial court, and where there is no abuse of such discretion, the verdict of the jury will not be disturbed. However, the practice of eliciting immaterial evidence and then moving to strike such testimony from the record is not to be commended.

4. Where the record discloses no prejudice, motive, feeling of ill-will or revenge on the part of the complaining witness against the defendant, and where it does not appear that the complaining

Points Decided.

witness was specially employed to make up evidence against the defendant, it is not error for the court to refuse to give an instruction to the jury that "Greater care should be exercised in weighing the testimony of informers, detectives and other persons specially employed to make up evidence against the defendant, than in the case of witnesses who are wholly disinterested."

5. The credibility of the witnesses, as well as the weight to be given to their testimony, is exclusively for the jury, and it would be error for the court to indicate the degree of credibility or the weight that should be given to the testimony of any witness.

6. Where specifications of error appear for the first time in counsel's brief, upon an appeal from a judgment and from an order denying a new trial, and do not appear in the transcript or in appellant's application for a new trial, such specifications of error will not be considered.

7. It is within the province of the court to say whether or not the evidence is competent or admissible, but its weight, credibility and sufficiency are primarily for the jury. There is no more justification for the court to assume the functions of the jury than for the jury to assume the duties of the court. Sec. 4824, Rev. Codes, provides: "Upon an appeal from a judgment, the court may review the verdict or decision and any intermediate order or decision, if excepted to, which involves the merits or necessarily affects the judgment, except a decision or order from which an appeal might have been taken: Provided, that whenever there is substantial evidence to support a verdict the same shall not be set aside."

8. Where there is evidence to sustain the verdict and there is a substantial conflict in the evidence, the verdict will not be disturbed. (*State v. Nesbit*, 4 Ida. 548, 43 Pac. 66; *State v. Silva*, 21 Ida. 247, 120 Pac. 835; *State v. Downing*, 23 Ida. 540, 130 Pac. 461; *State v. Hopkins*, 26 Ida. 741, 145 Pac. 1095, approved and followed.)

9. *Held*, that the court did not err in refusing to grant a new trial.

APPEAL from the District Court of the Eighth Judicial District for Benewah, formerly Kootenai, County. Hon. R. N. Dunn, Judge.

Prosecution for the crime of selling intoxicating liquors in a prohibition district. Judgment of guilty, from which defendant appeals. *Affirmed*.

Argument for Respondent.

McFarland & McFarland and R. B. Norris, for Appellant.

After a witness has once testified that the general reputation of another witness, in the community in which he resides, for truth or veracity, honesty or integrity is bad, he may testify whether or not he would believe him under oath. (*Stevens v. Irwin*, 12 Cal. 306; *Wise v. Wakefield*, 118 Cal. 107, 50 Pac. 310; *Mitchell v. State*, 148 Ala. 618, 42 So. 1014; *Bullard v. Lambert*, 40 Ala. 204; *Spies v. People*, 122 Ill. 1, 3 Am. St. 320, 12 N. E. 865, 17 N. E. 898; *Knight v. House*, 29 Md. 194, 96 Am. Dec. 515; *Keator v. People*, 32 Mich. 484; *People v. Rector*, 19 Wend. (N. Y.) 569; *Hillis v. Wylie*, 26 Ohio St. 574; *Page v. Finley*, 8 Or. 45; *Lyman v. Philadelphia*, 56 Pa. 488; *State v. Murphey*, 48 S. C. 1, 25 S. E. 43. *Teese v. Huntington*, 23 How. (U. S.) 2, 16 L. ed. 479.)

The following instruction, requested by the defendant, "The jury are instructed that greater care should be exercised in weighing the testimony of informers, detectives and other persons specially employed to make up evidence against the defendant, than in the case of witnesses who are wholly disinterested," is a reasonable one, and the court, in refusing to give it, committed reversible error. (40 Cyc. 2655; *Heldt v. State*, 20 Neb. 492, 57 Am. Rep. 835, 30 N. W. 626; *Kastner v. State*, 58 Neb. 767, 79 N. W. 713.)

J. H. Peterson, Atty. Genl., E. G. Davis, T. C. Coffin and Herbert Wing, Assistants, and N. D. Wernette, for Respondent.

Perhaps the weight of authority is now against permitting a witness to testify as to his own opinion on reputation. (Greenleaf on Evidence, 15th ed., art. 461.)

"Although the propriety of such questions has been doubted, yet the great weight of authority sustains the practice." (Jones on Evidence, 2d ed., art. 862, and authorities there cited.)

Even the line of cases cited by counsel for appellant holds that "the opinion of the credibility of a witness is held to be admissible on the same ground that opinions in regard to sanity, disposition, temper, distances, velocity, etc., are ad-

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missible.” (*Phillips v. Kingfield*, 19 Me. 375, 36 Am. Dec. 760.)

The prevailing rule in the United States is to conform the inquiry to the reputation of the witness for truth and veracity. (*Dimick v. Downs*, 82 Ill. 570; *Rudsill v. Slingerland*, 18 Minn. 380; *Sargent v. Wilson*, 59 N. H. 396; *Shaw v. Emery*, 42 Me. 59; Jones on Evidence, 2d ed., art. 861.)

Under this rule inquiry cannot be made of the witness as to particular facts which tend to discredit the reputation of the person sought to be impeached. (*Johnson v. State*, 61 Ga. 305; *Dimick v. Downs*, *supra*; *Conley v. Meeker*, 85 N. Y. 618; *Shaefer v. Missouri Pac. R. Co.*, 98 Mo. App. 445, 72 S. W. 154; Jones on Evidence, 2d ed., art. 860.)

It is not within the proper province of the judge to instruct the jury as to the relative credibility of classes of witnesses whose testimony comes in conflict. (Jones on Evidence, 2d ed., art. 901; *Nelson v. Vorce*, 55 Ind. 455; *Hronek v. People*, 134 Ill. 139, 23 Am. St. 652, 24 N. E. 861, 8 L. R. A. 837.)

“While the jury may consider whether or not the testimony of a detective or private policeman should be taken with some allowance, yet an instruction to the effect that such evidence should be received with a large degree of caution has been held error.” (*Hronek v. People*, *supra*; *State v. Hoxsie*, 15 R. I. 1, 2 Am. St. 838, 22 Atl. 1059; *Town of St. Charles v. O’Mailey*, 18 Ill. 407.)

BUDGE, J.—Appellant Bouchard was informed against, prosecuted for and convicted of the crime of wilfully and unlawfully selling intoxicating liquors in violation of law to one James Doyle on October 9, 1914, at St. Maries, then Kootenai, now Benewah county, Idaho.

Upon the verdict of the jury finding the defendant guilty of the unlawful sale of intoxicating liquors the court sentenced the appellant to ten days in the county jail and to pay a fine of \$100 and the costs of the action, fixed by the court at \$237. Within the time provided by the statutes and the orders of the court extending the time therefor, appellant duly and regularly made application for a new trial, which

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was denied. This is an appeal from the judgment and the order denying a new trial.

Counsel for appellant has made twelve specifications of error. We will consider only four of the alleged errors. Those not considered, in our opinion, have no merit. We will take up the assignments considered in their order.

First, counsel for appellant contends that the court erred in sustaining the state's objection to a question propounded to witness Keeton by counsel for defendant. The witness Keeton was called to testify for the defendant touching the general reputation of the prosecuting witness for truth, honesty or integrity in the community of St. Maries, where he resided, and testified as follows: "I am acquainted with his [Charles E. Bonell, the prosecuting witness] general reputation for truth, honesty and integrity in that community [St. Maries] . . . where I have known him to reside for the last two months. It is bad." Following the answer made by the witness, he was asked by counsel for the defendant: "Judging from that reputation, would you believe him under oath?" Counsel for the state objected to the question, which objection was sustained by the court. To this ruling of the court counsel for appellant excepted and assigns the same in this court as reversible error.

There are numerous authorities that hold this to be a proper question when the foundation for asking it has been laid, but in the absence of a proper foundation, the great weight of authority holds contrary to appellant's contention. The witness having stated that the reputation of the complaining witness for truth, honesty or integrity in the community of St. Maries, where he resided, was bad, the refusal of the court to permit the witness to answer what his judgment of that reputation was, and whether he would believe the prosecuting witness under oath, under the facts in this case, was not reversible error. Keeton's acquaintance with Bonell was limited to a period of about two months, during which time he had seen him occasionally, their acquaintance being only casual. It is, therefore, quite apparent from the record that the witness was not in possession of such knowl-

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edge as would make him a competent witness, should it be admitted that the question was a proper one to be asked under the statutes of this state. (Jones on Evidence, vol. 5, secs. 860-862, and authorities there cited; *Dimick v. Downs*, 82 Ill. 570; *Rudsill v. Slingerland*, 18 Minn. 380.)

It is next contended by counsel for appellant under his third specification of error that the court erred in sustaining the motion of counsel for the state and in striking out the testimony of witness Trummel, who had been called as a character witness by the defendant. Trummel, after testifying that the reputation of Bonell in the community of St. Maries was bad, upon cross-examination by the state, and apparently not responsive to the question, recited street gossip and conversations overheard by him carried on by third parties, to the effect that the prosecuting witness Bonell was in the habit of beating his board bills, hotel bills, passing worthless checks, obtaining money under false pretenses, etc.

As held in the case of *State v. McLaughlin*, 149 Mo. 19, 33, 50 S. W. 315: "It is settled law that when a witness is called to sustain or attack the reputation of another witness, the opposite party may cross-examine him liberally as to his means of knowledge, and to test his own truthfulness, and it is largely a matter of discretion with the court how far such an examination shall be allowed. We think it would be an unwise exercise of our appellate jurisdiction to reverse a cause on this showing alone." While the authorities cited concur in holding that a liberal cross-examination should be allowed, they also hold that the extent to which it may go is largely in the discretion of the trial court. The extent to which a cross-examination relating to collateral matters may be carried on is within the sound discretion of the presiding judge. (*State v. Crow*, 107 Mo. 341, 17 S. W. 745; *State v. Rollins*, 77 Me. 380; *Commonwealth v. Foran*, 110 Mass. 179.)

In view of all the evidence in this case, we are of the opinion that the action of the court in striking out the testimony of witness Trummel upon motion of the county prosecuting attorney was not error, and worked no prejudice to the de-

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fendant. The practice, however, of eliciting immaterial evidence and then moving to strike such testimony from the record is not to be commended.

The sixth assignment of error relied upon by counsel for a reversal of this cause is the refusal of the trial court to give the following instruction requested by the defendant, viz.:

“The jury are instructed that greater care should be exercised in weighing the testimony of informers, detectives and other persons specially employed to make up evidence against the defendant, than in the case of witnesses who are wholly disinterested.”

In our opinion the instruction given by the court, No. 13, fully meets the objections urged by counsel, which is as follows:

“The jury are the sole judges of the facts in this case and of the credit to be given to the respective witnesses who have testified, and in passing upon the credibility of such witnesses, you have the right to take into consideration their *interest* in the result of the case, *their prejudices, motives or feelings of revenge, if any such have been shown or proven by the evidence*, and if the jury believe that any witness has testified falsely as to any material fact or point in this case, the jury are at liberty, unless the witness is corroborated by other credible evidence, to disregard the testimony of such witness in whole.”

Where the evidence discloses deception, trickery, false pretenses, lying and deceit on the part of a person or persons employed to ferret out crime, a trial court should permit the fullest and most searching examination of the witness for the purposes of establishing his motive and inducement under which he acted, and no party should be allowed to keep back or conceal any fact that would tend to show that the witness or witnesses had an ulterior motive in bringing about the prosecution of the accused. And where it appears that trickery, deceit, duplicity or lying has been indulged in by any witness or witnesses, then, under such circumstances, it becomes the duty of the court to properly caution the jury in respect to the credibility of such witnesses, applying the prin-

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ciple as indicated in counsel's proffered instruction. But where there is no evidence upon which such an instruction could be based, the credibility of any witness, as well as the weight to be given to his testimony, is exclusively for the jury, and it would be clearly error for the court to indicate the degree of credibility or the weight that should be given to the testimony of such witness.

The witness Bonell testified in substance that he gave Doyle a dollar to buy a bottle of whisky, and that Doyle went to Bouchard and together they walked into the baggage-room of the hotel managed by Bouchard, where the witness Bonell saw Doyle give Bouchard the dollar and receive in turn from Bouchard a bottle of whisky; that he, Bonell, was employed by the sheriff of Kootenai county to obtain evidence against violators of the local option law; that his compensation did not depend upon convictions of such violators. The record discloses no prejudice, motive or feeling of ill-will or revenge upon the part of the complaining witness against the defendant.

There is no evidence in the record in this case to the effect that the complaining witness was employed specially for the purpose of securing evidence against the defendant, or that he had an ulterior motive in making up evidence against the defendant. That being true, we are unable to find any authorities that would justify us in holding that it was prejudicial error for the court to refuse to give defendant's proposed instruction, and we are of the opinion that the instruction was properly refused. (See *State v. Hoxsie*, 15 R. I. 1, 4, 2 Am. St. 838, 22 Atl. 1059; *Commonwealth v. Trainor*, 123 Mass. 414; *O'Grady v. People*, 42 Colo. 312, 95 Pac. 346.)

In *State v. Rollins*, 77 Me. 380, the court said: "The employment of detectives is not in all cases discreditable. In many cases it is the only way of bringing offenders to justice. It is as important that laws should be enforced as it is that they should be enacted. If it is commendable in the legislature to enact laws prohibiting the sale of intoxicating liquors, . . . it is equally commendable on the part of the

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community to endeavor to enforce them; and persons who are willing to spend their time . . . in efforts to enforce such laws, should not be unnecessarily exposed to the ill-will of persons whose crimes are thereby detected.” (*President & Trustees of the Town of St. Charles v. O’Mailey*, 18 Ill. 407; *Hronek v. People*, 134 Ill. 139, 23 Am. St. 652, 24 N. E. 861, 8 L. R. A. 837; *Nelson v. Vorce*, 55 Ind. 455.) Because they spend their time in assisting in the detection of law violations is no substantial reason why their testimony should be subject to any other test than is legally applied to the testimony of any other witness; even though it clearly appears that they are especially employed to obtain evidence against “boot-leggers,” or that any greater care and caution should be exercised by the jury in passing upon the credibility of their testimony or the weight to be given it, than is required to be given by the jury to the weight and credibility of the testimony of any other witness, in the absence of evidence showing bias, prejudice, hatred or ill-will against, or trickery practiced upon, the defendant, for the express purpose of securing his conviction.

Specifications of error Nos. 9 and 10 involving the legality of the assessment of costs by the court against the defendant do not appear in the appellant’s transcript on appeal, as settled and allowed by the trial judge. Said assignments are not mentioned in appellant’s application for a new trial. Where, upon an appeal from a judgment and from an order denying a new trial, specifications of error do not appear in the transcript or in appellant’s application for a new trial, but are urged for the first time in this court in appellant’s brief, they will not be considered.

The eleventh assignment of error is: “The verdict and judgment are contrary to the evidence, and the evidence is insufficient to justify the verdict or judgment.” Touching the sale of intoxicating liquor by the defendant Bouchard to Doyle the record is short, being in substance as follows:

That Charles E. Bonell who, for a short time prior to the arrest of the defendant, had been a resident of St. Maries,

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was, through the instrumentality of certain residents of St. Maries, interested in the suppression of the liquor traffic in that community, placed in communication with the officers of Kootenai county. An arrangement was reached whereby Bonell was employed to aid in securing evidence against parties engaged in the unlawful sale of intoxicating liquors in the city and vicinity of St. Maries.

Bonell, in pursuance of said arrangement, returned to St. Maries and shortly thereafter, in front of the hotel managed by the defendant, met one James Doyle, a former acquaintance, with whom he had a conversation in which intoxicating liquors were discussed. He thereafter handed Doyle a dollar and asked Doyle to buy him a bottle of whisky from the defendant. Thereupon Doyle entered the hotel, found the defendant, and with him went into a rear room, called the baggage-room or storeroom, where the defendant delivered to Doyle a bottle of whisky and Doyle handed the defendant a dollar. The witness Bonell testified that he entered the room where the transaction took place and saw the money paid to the defendant and the whisky handed to Doyle by the defendant; that thereafter Doyle and Bonell walked a short distance from the hotel, where each took a drink out of the bottle and then separated. Within a few days after this occurrence, the witness delivered the balance of the whisky and the bottle to the deputy sheriff at Coeur d'Alene City, which, upon the trial, was introduced in evidence.

Defendant, upon the witness-stand, denied that he sold Doyle the whisky and Doyle denied buying the whisky from the defendant. There were a number of witnesses called to prove that the prosecuting witness' reputation for truth, honesty or integrity was bad in the community of St. Maries. The state called a number of witnesses in rebuttal to prove that the reputation of the prosecuting witness for truth, honesty or integrity in the community of St. Maries was good. The witness Bonell also testified that a few days after Doyle purchased the bottle of whisky, he purchased a drink of whisky from the defendant.

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This in substance is the testimony that was submitted to the jury who, under proper instructions, found the defendant guilty.

The evidence offered in this case, as well as the conduct of the witnesses upon the trial, and their manner of testifying, were all considered by the jury in reaching their verdict. In this class of cases the difficulty rests principally in exposing the secret methods adopted by people engaged in the "boot-legging" business. Their standing in the community generally is well known. The methods adopted in conducting their unlawful business frequently rise up as silent witnesses against them, and furnish convincing evidence of their guilt. The conduct of the accused during the trial, his manner of testifying when supplemented with competent evidence, though not voluminous, is frequently sufficient to convince the minds of the jury beyond a reasonable doubt of his guilt.

It is within the province of the court to say whether or not evidence is competent or admissible, but its weight and credibility are primarily for the jury. There is no more justification for the court to assume the functions of the jury than there is for the jury to undertake to assume the duties of the court. Sec. 4824, Rev. Codes, provides: "Upon an appeal from a judgment, the court may review the verdict or decision and any intermediate order or decision, if excepted to, which involves the merits or necessarily affects the judgment, except a decision or order from which an appeal might have been taken: Provided, that whenever there is substantial evidence to support a verdict the same shall not be set aside."

In the case of *State v. Downing*, 23 Ida. 540, 130 Pac. 461, this court said: "Where there is a substantial conflict in the evidence and the evidence taken as a whole is sufficient to sustain the verdict, the verdict will not be disturbed." (*State v. Nesbit*, 4 Ida. 548, 43 Pac. 66; *State v. Silva*, 21 Ida. 247, 120 Pac. 835; *State v. Hopkins*, 26 Ida. 741, 145 Pac. 1095.)

It did not appear to the trial court in this case, on motion for a new trial, that the evidence was insufficient to sustain

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the verdict, and after examining the case as presented to us we find that there is a substantial conflict in the evidence, and that the evidence is sufficient to sustain the verdict. We have also concluded that the court did not err in overruling appellant's motion for a new trial. The judgment is affirmed.

Sullivan, C. J., and Morgan, J., concur.

(June 10, 1915.)

GORDON DAUGHERTY, Appellant, v. JOHN G. NAGEL,
as a Member of the Board of County Commissioners of
Bonner County, Respondent.

[149 Pac. 729.]

APPEAL—MOTION TO DISMISS—COUNTY OFFICER—REMOVAL OF—EXPIRATION OF TERM—OFFICIAL DUTY—NEGLECT TO PERFORM—PROCEEDING QUASI CRIMINAL.

1. Under the provisions of sec. 7459, Rev. Codes, for the removal of officers, if proceedings are brought thereunder before the term of the officer expires, the expiration of the term pending the determination of the cause does not work a dismissal of the proceeding.

2. The proceedings under sec. 7459, Rev. Codes, are in the nature of a *quo warranto* and are *quasi criminal*.

APPEAL from the District Court of the Eighth Judicial District. Hon. R. N. Dunn, Judge.

Action to remove a county officer under the provisions of sec. 7459, Rev. Codes. Motion to dismiss appeal. *Denied*.

Orley C. Granger, Peter Johnson and Black & Wernette, for Appellant.

The judgment of removal and the judgment imposing the penalty are not interdependent, but each must be rendered upon proof of guilt; one is for the benefit of the public, and

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the other for the benefit of the informer, and the accused is accountable both to the public and to the person who prosecutes the action.

The law says that if any person shall file his information and prove his charge, that he will be entitled to a certain judgment; and for the purpose of determining whether he is so entitled, it is necessary for the court to hear the information and the evidence offered by the respective parties, and to then say whether or not the charge is sustained. (*Rankin v. Jauman*, 4 Ida. 53, 36 Pac. 502; *Ponting v. Isaman*, 7 Ida. 581, 65 Pac. 434.)

An action does not abate by reason of the expiration of the controverted term of office, if the accused official is subject to the imposition of a fine and the costs of the action in the event of his removal. (*People ex rel. Drew v. Rodgers*, 118 Cal. 393, 46 Pac. 740, 50 Pac. 668.)

"Information in the nature of a *quo warranto* to try the right to a public office may be tried after the term is expired or the officer holding has resigned, if the information was filed or proceedings begun before the resignation took place or the term has expired." (*Hunter v. Chandler*, 45 Mo. 452; *McClelland v. Erwin*, 16 Okl. 612, 86 Pac. 283; *People v. Hartwell*, 12 Mich. 508, 86 Am. Dec. 70; *Albright v. Territory ex rel. Sandoval* (N. M.), 79 Pac. 719.)

Where the question involved in the case is of public interest, the appeal will not be dismissed though the question is no longer a practical one. (*In re Cuddeback*, 3 App. Div. 103, 39 N. Y. Supp. 388; *People ex rel. Spire v. General Committee*, 25 App. Div. 339, 49 N. Y. Supp. 723; 32 Cyc. 1440.)

H. H. Taylor, for Respondent.

An officer cannot be removed in one term for offenses committed in a prior term. (*Thurston v. Clark*, 107 Cal. 285, 40 Pac. 435; *Conant v. Grogan*, 43 Hun, 637, 6 N. Y. St. 322; *State v. Watertown*, 9 Wis. 254; *State v. Loomis* (Tex. Civ.), 29 S. W. 415; *Smith v. Ling*, 68 Cal. 324, 9 Pac. 171; *Woods v. Varnum*, 85 Cal. 639, 24 Pac. 843.)

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The court will not entertain an appeal after a change in circumstances which leaves only moot questions for decision. (2 R. C. L., sec. 145; *State v. Tudor*, 5 Day (Conn.), 329, 5 Am. Dec. 162; *People v. Sweeting*, 2 Johns. (N. Y.) 184; *Norwood v. Clem*, 143 Ala. 556, 39 So. 214, 5 Ann. Cas. 625; *State v. Grand Jury*, 37 Or. 542, 62 Pac. 208; *People v. Common Council of Troy*, 82 N. Y. 575; *Hice v. Orr*, 16 Wash. 163, 47 Pac. 424; *Moore v. Moores*, 36 Or. 261, 59 Pac. 327; *Old River Rice Irr. Co. v. Stubbs* (Tex. Civ.), 133 S. W. 494.)

SULLIVAN, C. J.—This proceeding was brought for the summary removal of the defendant, who was a member of the board of county commissioners of Bonner county, under the provisions of sec. 7459, Rev. Codes, on the ground that the defendant was guilty of charging and collecting illegal fees for services rendered or to be rendered in his said office, and has refused and neglected to perform the official duties pertaining to his office.

A demurrer to the information was interposed and was sustained as to the first cause of action and overruled as to the second cause stated in the information. The trial court proceeded to try said matter and at the close of plaintiff's testimony granted a motion for a nonsuit and a judgment of dismissal was entered and a motion for a new trial was denied. The appeal is from the judgment and from the order denying the new trial.

A motion to dismiss the appeal has been filed by the respondent on the ground and for the reason that the respondent has ceased to be a county commissioner of Bonner county by the expiration of his term of office, and that the question of his removal has thus become a moot question and that the district court has not and would not have jurisdiction to enter judgment of removal in case the appeal should be determined in favor of the appellant.

In limine, we will state that the information in this case was filed on the 10th of March, 1914, and the judgment of the district court was entered on the 21st of May, 1914, and the appeal was taken on the 14th of August, 1914, and the

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cause should have been heard at the December, 1914, term of this court, but on account of the congested condition of the business of the court, it was unable to hear it at that time and the case was continued to the May, 1915, term. Defendant's term of office did not expire until the second Monday of January, 1915, hence the entire proceedings in said matter had been had and the appeal perfected before the defendant's term of office had expired.

Said sec. 7459 is found in our Revised Statutes of 1887, and it is there indicated that it is a new section added by the code commission who compiled the Revised Statutes of 1887. That section was taken from the California Codes and is substantially the same as section 772 of the Penal Code of that state and was enacted by the legislature of that state on February 14, 1872. Counsel for respondent cites a number of California cases in support of his motion to dismiss the appeal, one of which is *Smith v. Ling*, 68 Cal. 324, 9 Pac. 171. In that case the information was filed and the proceedings begun after the defendant had ceased to be an officeholder, and it is distinguishable from the case at bar in that the case at bar was begun and the appeal perfected before the term of office of the defendant had expired. In that case it is also held that the fine is but a sequence of the paramount object of the statute, namely, the removal from office of the incumbent.

The same may be said of *In re Stow*, 98 Cal. 587, 33 Pac. 490, where it was held that the proceedings must be instituted while the accused is still in office and not after the term has expired.

In *Wheeler v. Donnell*, 110 Cal. 655, 43 Pac. 1, the court held that the main purpose of the act is to secure the removal of the officer guilty of unlawful conduct and the money judgment provided for is purely incidental to that purpose.

Counsel also cites many authorities to the effect that the court will not entertain an appeal after a change in circumstances which leaves only a moot question for decision.

The case of *Albright v. Territory* (N. M.), 79 Pac. 719, involved *quo warranto* proceedings to try title to the office of

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assessor of one of the counties of New Mexico and was taken by writ of error to the supreme court of the then territory, and a motion was interposed for the dismissal of the writ of error upon the ground that the term of office of the respondent had expired and that there was then nothing upon which the judgment of the court in case of a reversal could operate. The opinion is quite exhaustive and reviews many authorities and it is stated therein as follows:

“From a very early date it has been held that at common law the cessation of the usurpation before judgment did not terminate the proceeding. . . . ‘So, where a statute gives the prevailing party in proceedings upon a *quo warranto* information the right to costs absolutely, the court will give judgment of ouster, notwithstanding the information is entirely fruitless, the term of office having long since expired. [Citing *People v. Loomis*, 8 Wend. (N. Y.) 396, 24 Am. Dec. 33.] And the fact that the respondent’s term of office has expired pending the proceedings will not prevent judgment of ouster against him.’ [Citing *Hammer v. State*, 44 N. J. L. 667; High on Extraordinary Legal Remedies, § 754.] We have examined the cases cited in the text just quoted, and we find that they, and, indeed, generally speaking, the best considered American cases, all hold that the expiration of the term constitutes no reason for dismissal. . . . In *Hunter v. Chandler*, 45 Mo. 452, it is said: ‘Information in the nature of *quo warranto* to try the right to a public office may be tried after the term has expired, or the officer holding has resigned, if the information was filed or proceedings begun before the resignation took place or the term has expired.’ . . . In the case of *Commonwealth v. Smith*, 45 Pa. St. 60, it is said by the court, through Mr. Justice Woodward: ‘I have no doubt that *quo warranto*, brought within the term of an office, may be well tried after the term has expired.’ ”

If the position taken by respondent in this case be correct, as held in the Albright case, “it would be within the power of the usurper of an office, by resignation pending the suit, to evade all liability, or by dilatory tactics and by availing himself of the law’s delays, to prolong the duration of almost

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every suit of this kind beyond the term of office involved, and thus to come free of costs, fine or damages, however flagrant may have been his usurpation. The possibilities of this result are more than remote when it is recalled that many terms of office are only one or two years in duration, and that, in the ordinary administration of justice, it often takes fully that length of time to secure from the court of final resort a decision upon the merits of the controversy. We do not believe it to be the law that a litigant can thus speculate upon the chances of a trial of his case, and, by delaying the hearing of the cause a sufficient length of time, accomplish a result which could never be obtained by a trial upon the merits."

While the Albright case is a *quo warranto* proceeding, the rule there laid down in regard to the question under consideration is certainly applicable to this class of cases, and clearly shows why a case of this nature should not abate by reason of the resignation of the officer or the expiration of his term pending the hearing on appeal. Statutory proceedings under sec. 7459 are somewhat in the nature of *quo warranto* and are *quasi* criminal.

The question involved is also one of public interest, and if an officer against whom proceedings are brought under the provisions of sec. 7459, Rev. Codes, should be ever so guilty of charging and collecting illegal fees for services rendered, or ever so derelict in his refusal or neglect to perform the official duties pertaining to his office, and could defeat or abate a proceeding brought against him, it would be too much of an inducement for such an officer to resign or delay the proceedings until his term of office had expired in order to avoid the penalty provided under sec. 7459.

We therefore conclude that the motion to dismiss the appeal must be denied, and it is so ordered. Costs to follow decision of case on its merits.

Budge and Morgan, JJ., concur.

Argument for Appellant.

(June 12, 1915.)

JOHN ANTLEER, Appellant, v. M. M. COX et al.,
Respondents.

[149 Pac. 731.]

PERSONAL INJURIES—DAMAGES—SUFFICIENCY OF EVIDENCE—PROXIMATE CAUSE—NONSUIT.

1. Where it appears from the allegations of the complaint that the plaintiff relies upon the unsafe and unsuitable condition of the appliance or tools that he has to use in his work, in case of personal injury, in order to recover he must prove on the trial that such unsafe and unsuitable instrument was the proximate cause of his injury.

2. Where damages for personal injuries are claimed in an action which may have been occasioned by one of two causes, for one of which the defendants were responsible, and for the other they were not, the plaintiff must fail if his evidence does not show that the injuries were the result of the cause for which the defendants were responsible.

3. A proximate cause is that cause from which the effect might be expected to follow without the concurrence of any unusual circumstances.

4. *Held*, that the court did not err in granting a nonsuit.

APPEAL from the District Court of the Eighth Judicial District for Kootenai County. Hon. John M. Flynn, Judge.

Action to recover damages for personal injuries. Nonsuit granted and judgment of dismissal entered. *Affirmed*.

G. M. Ferris, E. J. Cannon and O. J. Bandelin, for Appellant.

Whether or not the jumping of the horse was the proximate cause, and whether or not appellant might have been injured had the respondents furnished proper appliances, were matters of fact to be submitted to the jury. (*Goe v. Northern Pac. R. Co.*, 30 Wash. 654, 71 Pac. 182; *Gray v. Washington W. P. Co.*, 27 Wash. 713, 68 Pac. 360; *Evansville*

Argument for Appellant.

Hoop & Stave Co. v. Bailey, 43 Ind. App. 153, 84 N. E. 549, 552.)

Appellant presented facts which entitle him to go to the jury, because it was the jumping of the horse which gave the respondents' negligence an opportunity to work the appellant harm. (*McDonald v. Toledo etc. Ry. Co.*, 74 Fed. 104, 20 C. C. A. 322; *Walrod v. Webster Co.*, 110 Iowa, 349, 81 N. W. 598, 47 L. R. A. 480; *McKean v. Chappell*, 56 Wash. 690, 106 Pac. 184; *Wible v. Burlington etc. Ry. Co.*, 109 Iowa, 557, 80 N. W. 679; *Olson v. Gill Home Inv. Co.*, 58 Wash. 151, 108 Pac. 140, 27 L. R. A., N. S., 884; *Wellington v. Pelletier*, 173 Fed. 908, 97 C. C. A. 458, 26 L. R. A., N. S., 719; *Strange v. Bodcaw L. Co.*, 79 Ark. 490, 116 Am. St. 92, 96 S. W. 152; *Bales v. McConnell*, 27 Okl. 407, 112 Pac. 978, 40 L. R. A., N. S., 940; 2 Labatt, Master & Servant, par. 813; *Grimes v. Louisville etc. Ry.*, 3 Ind. App. 573, 30 N. E. 200; *Baldrige etc. Bridge Co. v. Cartrett*, 75 Tex. 628, 13 S. W. 8; *Kennedy v. Mayor etc. of New York*, 73 N. Y. 365, 29 Am. Rep. 169; *Sturgis v. Kountz*, 165 Pa. St. 358, 30 Atl. 976, 27 L. R. A. 390.)

In order to hold the respondents liable in this case, it was only necessary to show that the appliance was of such a character that there was danger of some accident occurring by reason of its continued use. The following authorities support this contention: *Memphis Consol. Gas etc. Co. v. Creighton*, 183 Fed. 552, 106 C. C. A. 98; *Doyle v. Chicago etc. Ry. Co.*, 77 Iowa, 607, 42 N. W. 555, 4 L. R. A. 420; *Texas etc. Ry. v. Carlin*, 111 Fed. 777, 49 C. C. A. 605, 189 U. S. 354, 23 Sup. Ct. 585, 47 L. ed. 849.

The appliance which was furnished in the case at bar was not of such a character as could bring it within the "simple tool rule." Appliances much more simple in character have been decided by many courts not to be within the simple tool rule. (*Nicholds v. Crystal Plate Glass Co. (Mo.)*, 27 S. W. 516; *Pennsylvania Ry. v. Forstall*, 159 Fed. 893, 87 C. C. A. 73; *Finnerty v. Burnham*, 205 Pa. St. 305, 54 Atl. 996; *Harris v. Kansas City etc. Ry.*, 146 Mo. 524, 124 S. W. 576; *Tibbs v. Deemer Mfg. Co.*, 182 Fed. 48, 104 C. C. A. 488;

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Mulligan v. Colorado Fuel etc. Co., 20 Colo. App. 198, 77 Pac. 977; *Neubauer v. Northern Pac. R. Co.*, 60 Minn. 130, 61 N. W. 912; *Twombly v. Consolidated Electric Light Co.*, 98 Me. 353, 57 Atl. 85, 64 L. R. A. 551; *Williams v. Garbutt Lumber Co.*, 132 Ga. 221, 64 S. E. 65; *Parker v. W. C. Wood Lumber Co.*, 98 Miss. 750, 54 So. 252, 40 L. R. A., N. S., 832.)

That rule has no application where the master has assured the servant that the appliance was safe. (*Burkard v. Leschen etc. Rope Co.*, 217 Mo. 466, 117 S. W. 35, 40; *Christiansen v. McLellan*, 74 Wash. 318, 321, 133 Pac. 434; *Anus-tasakas v. International Contract Co.*, 57 Wash. 453, 107 Pac. 342; *Hilgar v. Walla Walla*, 50 Wash. 470, 97 Pac. 498, 19 L. R. A., N. S., 367.)

Black & Wernette and Post, Avery & Higgins, for Respondents.

A verdict must be based on facts, not on conjecture. The court has no right to permit the jury to guess or speculate as to the cause of an accident in an action for personal injuries. (*Whitehouse v. Bryant Lumber etc. Co.*, 50 Wash. 563, 97 Pac. 751; *Olmstead v. Hastings Shingle Mfg. Co.*, 48 Wash. 657, 94 Pac. 474; *Knapp v. Northern Pacific R. Co.*, 56 Wash. 662, 106 Pac. 190; *Peterson v. Union Iron Works*, 48 Wash. 505, 93 Pac. 1077; *Weckter v. Great Northern R. Co.*, 54 Wash. 203, 102 Pac. 1053; *Lewinn v. Murphy*, 63 Wash. 356, Ann. Cas. 1912D, 433, 115 Pac. 740; *Pearson v. Northern Pac. R. Co.*, 72 Wash. 8, 129 Pac. 573; *Searles v. Manhattan Ry. Co.*, 101 N. Y. 661, 5 N. E. 66; *Patton v. Texas & Pac. R. Co.*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. ed. 361; *Taylor v. City of Yonkers*, 105 N. Y. 202, 59 Am. Rep. 492, 11 N. E. 642; *Grant v. Pennsylvania & N. Y. Canal & R. Co.*, 133 N. Y. 657, 31 N. E. 220.)

“Proximate cause is such cause as would probably lead to injury and which has been shown to have led to it. There must be nothing to break the causal connection between the alleged negligence and the injuries.” (*Brown v. Oregon-Washington R. & N. Co.*, 63 Or. 396, 403, 128 Pac. 38, 40; *Washington v. Baltimore etc. R. Co.*, 17 W. Va. 190; *Clay-*

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pool v. Wigmore, 34 Ind. App. 35, 40, 71 N. E. 510; *Stone v. Boston & A. R. Co.*, 171 Mass. 536, 51 N. E. 1, 41 L. R. A. 794; *Behling v. Southwest Pennsylvania Pipe-lines*, 160 Pa. St. 359, 40 Am. St. 724, 28 Atl. 777; *Cole v. German Savings & L. Society*, 124 Fed. 113, 115, 59 C. C. A. 593, 63 L. R. A. 416; *Braun v. Craven*, 175 Ill. 401, 405, 51 N. E. 657, 659, 42 L. R. A. 199; *Cleveland C. C. & St. L. Ry. Co. v. Lindsay*, 109 Ill. App. 533; *Milwaukee etc. Ry. Co. v. Kellogg*, 94 U. S. 469, 475, 24 L. ed. 256; 1 Thompson's Commentaries on Negligence, 57; 29 Cyc. 528; *Hartvig v. N. P. Lumber Co.*, 19 Or. 522, 525, 25 Pac. 358.)

There is no evidence of a hidden defect, or a condition not known by plaintiff. (*Goure v. Storey*, 17 Ida. 352, 361, 105 Pac. 794.)

Where the method is understood, it is immaterial whether it is the usual or ordinary method. (*Smith v. Potlatch Lumber Co.*, 22 Ida. 782, 128 Pac. 546; *Drake v. Union Pac. Ry. Co.*, 2 Ida. (453) 487, 21 Pac. 560; *Day v. Cleveland etc. R. Co.*, 137 Ind. 206, 36 N. E. 854.)

The rule which governs the use of simple tools furnished by the master needs no extended discussion. (*Lapier v. Beau-bien Ice & Coal Co.*, 162 Mich. 533, 127 N. W. 692, 35 L. R. A., N. S., 199; *Stirling Coal & Coke Co. v. Fork*, 141 Ky. 40, 131 S. W. 1030; *Hogg v. Standard Lumber Co.*, 52 Wash. 8, 100 Pac. 151; *Cahill v. Hilton*, 106 N. Y. 512, 13 N. E. 339; *Meador v. Lake Shore & M. S. Ry. Co.*, 138 Ind. 290, 46 Am. St. 384, 37 N. E. 721; *Wheaton v. Wagner Lake Ice etc. Co.*, 151 Mich. 100, 114 N. W. 853; *House v. Southern R. Co.*, 152 N. C. 397, 67 S. E. 981.)

SULLIVAN, C. J.—This action was brought to recover damages for personal injuries received while in the employ of the respondents, which resulted in the loss of a leg.

It is alleged that the appliances furnished to appellant were unsafe and dangerous. On the trial appellant introduced his evidence and rested and counsel thereupon made a motion for a nonsuit, which the court sustained and entered a judgment dismissing the action. Thereafter a motion for a

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new trial was denied. The appeal is from the judgment and the order denying the new trial.

Appellant assigns as error the granting of respondents' motion for a nonsuit, denial of appellant's motion for a new trial, and that the court erred in entering judgment in favor of the respondents.

The following facts appear from the record: Appellant is 38 years of age, of German descent and does not speak the English language very well; has been in this country about eight years and has been employed most of the time as a carpenter, and had not had much experience in working in the woods or in handling horses until employed by respondents, where he had worked only a short time before the accident occurred.

The respondents were engaged in logging and maintaining and operating logging camps for the purpose of carrying on their business. Among other things, they were engaged in trailing logs down a chute. Two days prior to the accident, respondents requested appellant to take a horse and trail logs. The appellant objected to doing that kind of work and informed respondents that he knew nothing whatever about handling horses or of that kind of work, but consented to do the work.

The work of trailing logs is performed by the use of a horse and chain some 20 to 24 feet in length, attached to a singletree by means of a hook. On the end of this chain is attached a trail-hook. A number of logs are placed in the chute, one after another, and the trail-hook is fastened to the upper end of the upper log, and the horse is then driven along the chute, dragging or pushing the logs down the chute to the desired point. The chain in this instance was composed of about ten feet of link chain and about ten feet of wire cable and the hook was not fastened to the chain by a swivel. After the logs had been delivered to the desired point, appellant would remove the hook from the log, turn the horse around and then put the trail-hook in the ring on the singletree and the horse would then be driven back to the point of the chute where the next load of logs was to be taken

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from. This operation was repeated several times an hour. The horse was well broken in this kind of work and was handled without lines; that is, the lines were not taken down from the hames. It appears that the trail-hook was attached to the wire cable without a swivel and at times became unhooked, or the hook would come out of the ring on the singletree as the horse dragged it back for another load. Appellant was instructed by respondents to use this appliance and was assured by them that it was safe.

While the appellant was using this appliance as above stated and at the time of the accident, it appears that he had just trailed some logs and was returning for another load; that he had turned the horse around and hooked the hook in the ring of the singletree and had started the horse back in the proper direction, when for some reason the horse after going a short distance turned from the path along the chute and appellant went in front of him in order to turn him around and keep him in the proper direction. He held up his hands and called to the horse to stop. The horse at that suddenly jumped past the appellant, dragging the chain after him. The hook came out of the ring in the singletree and the chain and cable were thrown around a tree and caught appellant's leg back of the knee and he was thus dragged some hundred feet or more before the horse could be stopped. Appellant's leg was badly lacerated and torn by the hook. Thereupon appellant was taken to the camp and a doctor was procured in about twenty-six hours, who stitched up and cleaned the wounds. Gangrene set in about the fourth day and the leg was thereafter amputated above the knee.

Certain expert witnesses testified that the appliance or chain furnished to the appellant was not like the one which is generally used or which is ordinarily or customarily used for such work; that the proper appliance is a chain and a swivel. It is claimed by counsel for appellant that the theory upon which the court sustained the motion for a nonsuit was that the jumping of the horse or the running away of the horse was the proximate cause of the accident, for which the respondents were in no wise responsible, and that appellant

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might have been injured had the respondents furnished a chain and swivel instead of the chain and cable used, and counsel contend under the authorities that whether or not the jumping of the horse was the proximate cause of the accident, and whether or not appellant might have been injured had respondents furnished the alleged proper appliances, were matters of fact to be submitted to the jury.

In the judgment of nonsuit the court stated as follows:

"The defendant moved the court that this action be withdrawn from the jury and a judgment of nonsuit be entered herein for the reason that the evidence introduced by plaintiff and the proof made by him in this case was not sufficient to warrant submitting the cause to the jury for its decision," and sustained the motion and entered judgment dismissing the action.

The reason, as stated in paragraph 7 of the complaint, why the defendants were chargeable with this accident, is as follows: "That said appliances were unsafe and dangerous for the reason that the cable to which the trail-hook was fastened was stiff and unwieldy, thereby causing said cable to twist and curl as it was dragged along the ground by the horse, and causing the trail-hook to fly around in a dangerous manner, whereas, had defendants furnished the proper, suitable and reasonably safe appliances as heretofore described, said trail-hook would have remained upon the ground as it was dragged along."

The conditions there alleged were not proven on the trial. Instead of proving that this hook dragged on the ground at the end of a cable, and because of the twisting and curling of the cable it would fly around and become dangerous, the appellant testified that its normal condition when not attached to a log was to be hooked in the singletree and dragged on the ground and that it would become unhooked, a condition contrary or opposed to said allegations of the complaint.

In the ninth paragraph of the complaint, it is alleged that "the wire cable to which the trail-hook was fastened, because of being an improper and unsuitable appliance, and not rea-

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sonably safe as hereinbefore alleged, curled and twisted about in such a manner that the trail-hook struck and caught plaintiff," etc. We find nothing in the testimony offered that would authorize the jury to attribute said accident to the curling or twisting of the cable.

It appears from the allegations of the complaint that the plaintiff relied upon the unsafe and unsuitable condition of the cable, and because of its being an improper and unsuitable appliance it was responsible for the accident; but the evidence introduced does not establish the fact that the cable was responsible for the accident.

Counsel for appellant contend that the proximate cause of the injury was the negligence of the defendants in furnishing said chain and cable for the use of appellant. As will be noted from the above quotation from the court's decision, the court granted a judgment of nonsuit "for the reason that the evidence introduced by the plaintiff and the proof made by him in this case was not sufficient to warrant submitting the case to the jury for its decision." The court was justified in finding that there was not sufficient evidence to establish the principal allegations of the complaint, and hence declined to submit the case to the jury. It may have been that the main reason the court granted the nonsuit was that he concluded that the evidence was not sufficient to charge the respondents with the proximate cause of the injury sustained by the plaintiff, and if that be true the court did not err in so concluding.

We find no testimony in the record which shows that the hook would come out of the ring in the singletree because the "wire cable was stiff and attached to the trail-hook without a swivel." Appellant testified that the hook came out frequently—several times a day—because in dragging it behind the horse it would catch on rough places and become unhooked. The evidence shows that the horse in going back up the chute turned around or left the trail, for some reason not shown by the evidence, and appellant tried to go around him and get to his head, but the horse turned about very quickly and made for the back path which went between the chute

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and a tree. Appellant tried to get there first and head the horse off, but did not do so, but stopped at the tree because both could not go past at the same time. Appellant was waving his hands and calling to the horse to stop, which the horse refused to do, and after it passed the tree the chain swung around and appellant was struck by the hook. Appellant testified that he did not know when or how the hook became detached from the ring in the singletree, and it may have been because the singletree hit the tree or because of the sudden turn of the horse, either of which would possibly dislodge the hook. No negligence is charged because of the size, form or position of the hook or the ring in which it was fastened. From the evidence it was impossible for the jury to say that the cable caused the hook to come out of the ring, and it would be a pure guess as to whether or not the cable caused the hook to come out of the ring, and the jury, if the case had been submitted to them, would be left to speculate as to the cause of the hook's coming out of the ring.

The runaway horse brought about conditions not contemplated by anyone. In his testimony appellant admitted that the horse was a good horse and well trained and knew his business, and that he had never acted that way before. It appears that suddenly, without warning, the horse, either through fright or some other cause, started to run away, and while appellant was trying to stop him, the accident occurred. The evidence does not show that because of the twisting of the cable the hook became detached from the singletree, and the jury, if it had entered a verdict against the defendants, would have had to guess what caused the hook to become detached from the singletree. One witness testified that the horse was on the gallop as he came down the path.

In an action for personal injury, a court ought not to permit a jury to guess or speculate as to the cause of an accident causing such injuries. As bearing upon this question, see *Whitehouse v. Bryant Lumber & S. Co.*, 50 Wash. 563, 97 Pac. 751; *Olmstead v. Hastings Shingle Mfg. Co.*, 48 Wash. 657, 94 Pac. 474.

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In *Searles v. Manhattan Ry. Co.*, 101 N. Y. 661, 5 N. E. 66, the question was whether or not the cinder that fell in plaintiff's eye came from a smokestack or whether it came from the ash-pan of an engine because the ash-pan was out of repair. The court said:

“When the fact is that the damages claimed in an action were occasioned by one of two causes, for one of which the defendant is responsible, and for the other of which it is not responsible, the plaintiff must fail if his evidence does not show that the damages were produced by the former cause, and he must fail, also, if it is just as probable that they were caused by the one as by the other, as the plaintiff is bound to make out his case by the preponderance of evidence. The jury must not be left to mere conjecture; and a bare possibility that the damages were caused in consequence of the negligence and unskillfulness of the defendant is not sufficient.” (See, also, *Taylor v. City of Yonkers*, 105 N. Y. 202, 59 Am. Rep. 492, 11 N. E. 642.)

Under the facts as shown by the evidence, it cannot be said as a matter of law, or at all, that the appellant would or would not have been injured if a chain had been used instead of a part chain and part cable, or that he was or was not injured because of the chain being part cable, because there is no evidence whatever to give the court or jury any information as to why this hook hit the appellant except that it was being dragged or carried behind a runaway horse, and the trial court held that as a matter of law there was no evidence from which a reasonable mind could find that the cable was the proximate cause of the accident.

The appellant contends that if respondents had furnished a chain, the chain would have followed the horse in his runaway, and for that reason there would have been no injury; but this is a mere conjecture, since if the horse turned suddenly, as it appears he did in this case, with a long chain dragging behind him, it certainly would not have followed in a direct line with the horse. This contention is an effort to assume facts which do not appear in the case.

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The accident certainly would not have happened had the horse not run away and had the work progressed in the usual way; nor can it be said that the accident might reasonably have been expected to happen, since the horse which caused the accident was correctly trained, gentle and used to the work.

In *Brown v. Oregon-Washington R. & N. Co.*, 63 Or. 396, 403, 128 Pac. 38, in referring to the question of proximate cause in personal injury cases, the court said:

"The law regards the one as the proximate cause of the other, without regard to the lapse of time where no other cause intervenes or comes between the negligence charged and the injuries received to contribute to it. There must be nothing to break the causal connection between the alleged negligence and the injuries."

In *Cole v. German Savings & L. Society*, 124 Fed. 113, 59 C. C. A. 593, 63 L. R. A. 416, the court said:

"An injury that results from an act of negligence, but that could not have been foreseen or reasonably anticipated as its probable consequence, and that would not have resulted from it, had not the interposition of some new and independent cause interrupted the natural sequence of events, turned aside their course, and produced it, is not actionable. Such an act of negligence is the remote, and the independent intervening cause is the proximate, cause of the injury. A natural consequence of an act is the consequence which ordinarily follows it—the result which may be reasonably anticipated from it. A probable consequence is one that is more likely to follow its supposed cause than it is to fail to follow it."

A proximate cause is one from which the effect might be expected to follow without the concurrence of any unusual circumstances. (32 Cyc. 745.)

The rule is thoroughly established by the authorities that proximate causes are such as are the ordinary and natural results of the omission or negligence complained of, and are usual and might have been reasonably expected to occur.

The tool or appliance that caused the injury was a very simple one, and the plaintiff had actually worked with it for several days and made trips every ten or fifteen minutes with

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it. He testified that the hook came out many times every day and that he put it back. There is no evidence to show that it was dangerous when used in the manner contemplated, and when the horse was not running away. There had been no trouble in connection with the hook except that it would come unhooked from the singletree when the horse was dragging it back over rough ground. If the horse had not been running away, the hook would not have been flying in the air. There is no evidence that there was any hidden defect in it.

As bearing upon the questions here involved, see *Drake v. Union Pac. Ry. Co.*, 2 Idaho (453), 487, 21 Pac. 560; *Harvey v. Alturas Coal Min. Co.*, 3 Ida. 510, 31 Pac. 819; *Goure v. Storey*, 17 Ida. 352, 363, 105 Pac. 794; *Day v. Cleveland etc. R. Co.*, 137 Ind. 206, 36 N. E. 854.

The court did not err in sustaining said motion for a nonsuit.

Finding no reversible error in the record, the judgment of the trial court must be affirmed, and it is so ordered, with costs in favor of the respondents.

Budge and Morgan, JJ., concur.

(June 12, 1915.)

RUDOLPH SCHULTZ and GUSTAV HOLZENDORF, Respondents, v. ROSE LAKE LUMBER COMPANY, Appellant, and ALBERT V. HOLZENDORF, Respondent.

[149 Pac. 726.]

LIENS UPON LOGS—PLEADINGS—ERRORS NOT AFFECTING RIGHTS OF PARTIES—FILING LIEN WITH LUMBER INSPECTOR.

1. While it is the correct practice in a case of this kind to allege all the ultimate facts made necessary by statute to create a valid lien, and while the requirements in this behalf are not complied with by attaching a copy of the notice of claim to the complaint as an exhibit, where the defendant answers and denies the existence of such facts, the allegations of the answer are deemed to be controverted by the plaintiff and the issue is thus placed before the court.

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2. A judgment will not be reversed by reason of an error or defect in the pleadings or proceedings which does not affect the substantial right of the parties.

3. A claim of lien, valid in all other particulars, is not void as against parties thereto by reason of not being filed with or recorded by the lumber inspector as provided by sec. 1503, Rev. Codes.

APPEAL from the District Court of the First Judicial District for Shoshone County. Hon. William W. Woods, Judge.

Action to foreclose a lien upon sawlogs. Judgment for plaintiffs. *Affirmed*.

J. E. Gyde, for Appellant.

There is no allegation in the complaint that Albert V. Holzendorf was either the owner of the logs or the agent of the owner. There must be an allegation of ownership. (*Adams v. Buhler*, 116 Ind. 100, 18 N. E. 269; *Wyman v. Quayle*, 9 Wyo. 326, 63 Pac. 988; *Knapp Electrical Works v. Mecosta Electrical Co.*, 110 Mich. 547, 68 N. W. 245.)

If Schultz was owing Albert V. Holzendorf on some other account a sum equal to or greater than the agreed value of Schultz's services on the logs and timber, then Schultz would not be entitled to a lien upon the logs and timber for such services. (*Tuckey v. Lovell*, 8 Ida. 731, 71 Pac. 122.)

That plaintiff annexed a copy of his notice of claim of lien to the complaint and made the same a part thereof, wherein certain allegations omitted in the complaint are found, will not cure the defects in the complaint. (*Sweeney v. Johnson*, 23 Ida. 530, 130 Pac. 997; *Ahlers v. Smiley*, 11 Cal. App. 343, 104 Pac. 997; *McPherson v. Hattich*, 10 Ariz. 104, 85 Pac. 731.)

A. G. Kerns, for Respondents, cites no authorities.

MORGAN, J.—Albert V. Holzendorf purchased from Gustav Holzendorf certain standing timber which he cut into

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sawlogs and sold to Rose Lake Lumber Company. He employed Rudolph Schultz to haul the logs and having failed to pay for that service or to pay in full for the timber, Schultz filed a lien for his wages and Gustav Holzendorf filed a lien for the balance due upon the purchase price, making Albert V. Holzendorf and Rose Lake Lumber Company parties thereto. This action was commenced to foreclose the liens and the claim of Gustav Holzendorf was stated as the first, and that of Schultz as the second cause of action in the complaint. Albert V. Holzendorf failed to answer or otherwise appear and his default was entered. Rose Lake Lumber Company demurred to both causes of action and its demurrer was sustained as to the first cause and overruled as to the second. Gustav Holzendorf declined to further plead and Rose Lake Lumber Company answered the second cause of action. The trial resulted in a decree in favor of respondents which, omitting the introductory paragraph, is as follows, to wit:

“Therefore, it is hereby ordered, adjudged and decreed that the plaintiff Gustav Holzendorf do have and recover judgment against the defendant Albert V. Holzendorf for the sum of three hundred fifty-eight and 85/100 dollars (\$358.85), with interest thereon at the rate of seven per cent per annum from July 11, 1913; the sum of five dollars for verifying and recording his lien; and the sum of seventy-five dollars as attorney fees, together with the costs of this action aggregating the sum of — dollars (\$——).

“It is further ordered that the plaintiff Gustav Holzendorf is entitled to a lien upon the timber cut from his premises amounting to the sum of 127,040 feet of white pine timber and logs, and 37,350 feet of mixed timber and logs branded ‘B,’ and that such lien relates to and bears date from February 1, 1913, and that the plaintiff is entitled to the foreclosure of said lien and the satisfaction of this judgment from the proceeds thereof, as against Albert V. Holzendorf but not against the Rose Lake Lumber Company, defendant.

“And it is further ordered, adjudged and decreed that the plaintiff Rudolph Schultz do have and recover of and from the defendant Albert V. Holzendorf the sum of one hundred

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and forty-four dollars with interest thereon from the 22d day of May, 1913, at the rate of seven per cent per annum; the sum of five dollars for preparing, verifying and recording his lien; and the sum of fifty dollars as attorney's fees for foreclosing this lien, together with the costs of this action taxed at the sum of — aggregating the total sum of — dollars.

"That the amount of said judgment is hereby declared to be a lien upon 127,040 feet of white pine logs, and 37,350 feet of mixed timber and logs cut upon the northwest quarter of section thirty, township forty-eight north, of range 2 E., B. M., in Shoshone county, state of Idaho, the homestead claim of Gustav Holzendorf, between the 1st day of February, 1913, and the 11th day of July, 1913, and that the plaintiff be decreed to have the right to proceed hereunder for the foreclosure and sale of said timber and the satisfaction of this judgment from the proceeds thereof."

This appeal is from that portion of the decree granting unto Gustav Holzendorf a lien upon the logs and a right of foreclosure thereof; also from that portion granting unto Rudolph Schultz a personal judgment against Albert V. Holzendorf, awarding him a lien upon the logs and a right of foreclosure thereof.

It is urged by appellant that the demurrer to the second cause of action stated in the complaint should have been sustained for the following reasons:

1. There is no allegation in the complaint that Albert V. Holzendorf was either the owner or agent of the owner of the logs upon which Schultz alleges he performed the labor;

2. There is no allegation in the complaint that the performance of the labor was concluded within sixty days prior to filing the claim of lien;

3. There is no allegation in the complaint that at the time of commencement of the action or at the time the claim of lien was filed, there was any sum due from Albert V. Holzendorf to Schultz after deducting all just credits and offsets.

The matters of fact suggested by the foregoing objections to the complaint are necessary to be recited in a claim of lien for money due for labor performed upon sawlogs and they

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were recited in the claim, which was attached as an exhibit to and made a part of the complaint.

In case of *Sweeney v. Johnson*, 23 Ida. 530, 130 Pac. 997, cited by appellant, this court decided:

“Pleading an instrument by attaching a copy of the complaint as an exhibit thereto does not tender an issue or involve an assertion of the truth of the statements and recitals contained in the exhibit; and in order to tender an issue as to the truth or correctness of statements and recitals contained in such exhibit, it is necessary to plead them in appropriate terms, and a defendant is not called upon to deny or traverse the statement and recitals contained in an exhibit unless the pleading to which such exhibit is attached alleges in appropriate terms the truth and correctness of the statement or statements which it is intended to tender as an issue or issues.”

In that case the claim of lien had been referred to, attached as an exhibit and made a part of the complaint. At the conclusion of the introduction of evidence a motion was made by plaintiff to amend the complaint to conform to the proofs by alleging the reasonable value of plaintiff's services and of the materials furnished by him which allegations appeared in the claim of lien but not otherwise in the complaint. The trial court denied the motion apparently upon the theory that the complaint required no amendment in that particular. While holding, as above quoted, that the complaint was insufficient this court further said: “The amendment should have been allowed. Secs. 4225, 4226, 4229 and 4231 of the Rev. Codes are clearly intended to cover just such cases as this, and it was within the power of the trial court to order the amendment requested in this case, and we think it was his duty to grant the request.” Sec. 4231, referred to by the court, is as follows:

“The court must, in every stage of an action, disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the parties and no judgment shall be reversed or affected by reason of such error or defect.”

Conforming to the mandate of said section the court affirmed the judgment in that case.

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Undoubtedly it is the correct practice in cases of this kind to allege in the complaint all ultimate facts necessary to create a valid claim of lien. It was alleged in the complaint, after stating that Schultz performed 24 days' work for Albert V. Holzendorf in hauling the logs in question, that said Holzendorf transferred and delivered the logs to Rose Lake Lumber Company. Under the circumstances of this case said allegation is sufficient to present an issue as to the ownership of the logs. Appellant alleged in its answer, upon information and belief that, if Schultz ever performed any labor upon the logs, more than sixty days had elapsed since the close of the rendition of such services and prior to the filing of the claim of lien; also that at the time the claim of lien was filed Albert V. Holzendorf was not indebted to Schultz but that Schultz was indebted to him in a sum in excess of \$155.75. Not only was appellant not misled by the failure of plaintiffs to allege that sixty days had not elapsed after the close of the rendition of the services and before filing the claim of lien or by their failure to allege that there was due to Schultz from Albert V. Holzendorf the sum of money in the claim of lien stated, after deducting all just credits and offsets, but it has in its answer presented these issues which are deemed to be denied by the plaintiffs. Sec. 4217, Rev. Codes, provides, in part, as follows: "The statement of any new matter in the answer, in avoidance or constituting a defense or counterclaim, must, on the trial, be deemed controverted by the opposite party." By the allegations of the answer and by virtue of the statute above quoted, the facts of filing the claim of lien in time and of the indebtedness of Holzendorf to Schultz, after deducting all just credits and offsets, were placed in issue.

Since no substantial right of the parties was affected by reason of the defects in the complaint above mentioned, the action of the trial judge in overruling the demurrer to the second cause of action will be sustained, as directed by sec. 4231, *supra*. (See, also, *Spongberg v. First Nat. Bank*, 15 Ida. 671, 99 Pac. 712; *Rowley v. Stack-Gibbs Lumber Co.*, 19 Ida. 107, 112 Pac. 1041; *Smith v. Field*, 19 Ida. 558, Ann. Cas. 1912C, 354, 114 Pac. 668; *Nobach v. Scott*, 20 Ida. 558,

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119 Pac. 295; *Richardson v. Bohnney*, 26 Ida. 35, 37, 140 Pac. 1106; and *Trask v. Boise King Placers Co.*, 26 Ida. 290, 142 Pac. 1073.)

We are asked by appellant to so modify the decree as to make it perfectly clear that the logs are not to be sold in order to satisfy the judgment in favor of Gustav Holzendorf.

After making his findings of fact and conclusions of law the trial judge made the following supplemental findings and conclusion:

“The court further finds that on the 25th day of February, 1914, this court sustained a separate demurrer of the defendant, Rose Lake Lumber Company, to the first cause of action set forth in the second amended complaint, being the cause of action set forth in said second amended complaint in favor of the plaintiff Gustav Holzendorf, and that on said day this court entered judgment dismissing the said first cause of action of the plaintiff Gustav Holzendorf, as to the defendant Rose Lake Lumber Company.

“The court further finds that the plaintiff, Gustav Holzendorf, has no lien upon or claim to the said logs described in said second amended complaint or any part thereof as against the defendant Rose Lake Lumber Company, and that any claim which the defendant Rose Lake Lumber Company has in or to the said logs is not subject to any claim of lien of the plaintiff Gustav Holzendorf.

“As a conclusion of law from the foregoing findings, the court finds that the plaintiff Gustav Holzendorf is not entitled to a decree or judgment of this court decreeing that the logs described in the second amended complaint are subject to any lien in favor of plaintiff Gustav Holzendorf as against any claim of the Rose Lake Lumber Company, but that the defendant Rose Lake Lumber Company is entitled to a decree of this court decreeing that any interest which the defendant Rose Lake Lumber Company has in or to said logs, or any claim the defendant Rose Lake Lumber Company has in or to said logs is not subject to any lien in favor of the plaintiff Gustav Holzendorf and decreeing that any claim which the defendant Rose Lake Lumber Company has in or to said logs

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is a valid and superior claim as against the plaintiff Gustav Holzendorf, and that the plaintiff Gustav Holzendorf's claim of a lien upon said logs is invalid as to the defendant, Rose Lake Lumber Company."

The decree recites that Gustav Holzendorf is entitled to a lien upon the timber cut from his premises and that he is entitled to foreclose it and to satisfy his judgment from the proceeds as against Albert V. Holzendorf but not against Rose Lake Lumber Company. Manifestly the decree means that any interest Albert V. Holzendorf may still retain in the logs shall be held to be subject to the lien but that the interest of appellant shall not be so held. Appellant cannot complain of this construction of the language of the decree and it seems to have no other meaning.

Appellant further contends that the evidence fails to show that Albert V. Holzendorf was indebted to Schultz at the time his claim of lien was filed and at the time the action was commenced, but that, upon the other hand, it does show that at said times Schultz was indebted to Holzendorf. Testimony offered on behalf of respondents shows that Schultz hauled the logs, the amount of compensation agreed upon and that it had not been paid. It appears that at the time this action was commenced two actions were pending which subsequently resulted in judgments in favor of Albert V. Holzendorf and against Schultz and others, amounting, in the aggregate, to more than the amount of the claim of Schultz in this case, but it also appears that Schultz was only a nominal party defendant and that his codefendants owed the debt and he did not.

It is contended that the findings of fact are insufficient to sustain the decree and that the evidence is insufficient to sustain the findings. We are convinced that both the findings and evidence are sufficient.

Counsel for appellant filed a supplemental brief in which it is suggested there is neither allegation nor proof that the lien claimants filed or recorded their claims of lien with the lumber inspector as provided by sec. 1503, Rev. Codes, which is as follows:

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“All mortgages, liens, bills of sale or other written instruments in any way affecting the ownership of any marked logs in any lumber district, shall specify the marks placed upon said logs and when they were cut, and shall be recorded in the office of the lumber inspector in which said marks were recorded; and no such conveyance, lien, mortgage or transfer shall be valid, except as to the parties thereto, until the same is so recorded, or until the same shall be filed with some deputy lumber inspector, who shall immediately forward such instrument to the inspector of the proper district. Such filing and recording of all such instruments and papers shall have the same effect as the recording of deeds and mortgages in the office of the county recorder.”

This contention does not appear to have been made in the district court and it is not based upon any assignment of error, neither does it appear to be meritorious. Both the appellant and Albert V. Holzendorf were named as parties in the claims of lien, and as to such parties a lien, valid in all other particulars, is not void for failure to file or record it with the lumber inspector as provided in the section of the code above quoted.

We find no reversible error in the record and the decree is affirmed. Costs are awarded to respondents.

Sullivan, C. J., and Budge, J., concur.

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(June 15, 1915.)

**F. A. BLACKWELL, Appellant, v. R. F. KERCHEVAL,
Respondent.**

[149 Pac. 1060.]

**DEMURRER—ADMISSION IMPLIED BY—RATIFICATION OF UNAUTHORIZED
ACT OF AGENT—EFFECT OF—CONSIDERATION FOR—RATIFICATION A
QUESTION OF FACT.**

1. In considering the questions raised on an appeal from an order of the trial court sustaining a demurrer to the complaint, the truth of every material allegation of the complaint which is well pleaded must be deemed to be admitted by the demurrer.

2. A principal may ratify an unauthorized act of his agent if, at the time of such ratification, he has knowledge of all of the material facts connected with the transaction, and the ratification may be either by words or by conduct indicating an intention on the part of the principal to adopt the act as his own; such intention is implied from an acceptance of the benefits of the unauthorized act.

3. Where a principal, with knowledge of the facts, ratifies the unauthorized act of an agent, principal and agent are invested with the same rights and obligations respectively as if the transaction had been previously authorized, and the agent is thereby relieved from personal responsibility by reason of such unauthorized act, whether he exceeded or departed from his instructions, or was a mere volunteer with regard to the conduct in question.

4. One who voluntarily accepts the benefits of an unauthorized act by another, ratifies the act, and takes it as his own with the burdens incident thereto. One may not appropriate the benefits of a transaction made in his behalf, and while retaining them, disavow the burdens or disadvantages arising out of it.

5. A principal's ratification of the act of his agent requires no new consideration.

6. Where a request is made to continue services of a character theretofore rendered, or with regard to the same subject matter, the continuance of such services is a sufficient consideration to support a promise to pay for those rendered prior to such request.

7. Where the admitted facts surrounding a given transaction are such that reasonable men could draw different conclusions as to whether or not there has been a ratification by the principal of the unauthorized act of an agent, or the extent of such ratifica-

Argument for Appellant.

tion, the question is one of fact to be determined by the jury under proper instruction from the court, and it is error to sustain a general demurrer to a complaint, where it appears from the allegations that questions of fact are involved.

8. *Held*, that the complaint in this case states a cause of action, and that the demurrer should have been overruled and the defendant required to answer.

APPEAL from the District Court of the Eighth Judicial District for Kootenai County. Hon. John M. Flynn, Judge.

Action to recover on an alleged contract of agency. Demurrer to complaint sustained and judgment rendered in favor of defendant. *Reversed*.

John P. Gray, for Appellant.

"The subsequent ratification of the act done by even a voluntary agent of another without authority from him is equivalent to a previous authority." (*Gleason v. Dyke*, 22 Pick. (39 Mass.) 390; *Viley v. Pettit*, 96 Ky. 576, 29 S. W. 438.)

In the case at bar, Mr. Kistler, knowing all the facts, not only consented to Mr. Blackwell's actions in connection with the transaction, but expressly affirmed them; accepted the benefits of them; did not reject or object to them, and agreed to indemnify him. (*Gelatt v. Ridge*, 117 Mo. 553, 38 Am. St. 683, 23 S. W. 882; *Tiffany on Agency*, 86; *Mechem on Agency*, secs. 350, 351, 500, 498, 1521, 1609; *Wharton on Agency*, sec. 87; *Drakely v. Gregg*, 8 Wall. (U. S.) 242, 19 L. ed. 409.)

A new consideration is not necessary to support the ratification of an agent's unauthorized contract. (*McLeod v. Morrison & Eshelman*, 66 Wash. 683, 120 Pac. 528, 38 L. R. A., N. S., 783; *Lynch v. Smyth*, 25 Colo. 103, 54 Pac. 634; *Fant v. Campbell*, 8 Okl. 586, 58 Pac. 741.)

A promise founded partly on a past consideration and partly on an executory one is enforceable. (9 Cyc. 362; *Fisk Min. & Mill Co. v. Reed*, 32 Colo. 506, 77 Pac. 240.)

Argument for Respondent.

A moral obligation, accompanied by a benefit received by the promisor, is sufficient in connection with the receipt of such benefit to support a contract. (*Goulding v. Davidson*, 26 N. Y. 604; *Doty v. Wilson*, 14 Johns. (N. Y.) 378; *Lycoming County v. Union County*, 15 Pa. 166, 53 Am. Dec. 575-581; *Doyle v. Reilly*, 18 Iowa, 108, 85 Am. Dec. 582; *Chadwick v. Knox*, 31 N. H. 226, 64 Am. Dec. 329.)

C. H. Potts and G. D. Lantz, for Respondent.

Since appellant did not assume to act as agent for Mr. Kistler in so far as the taking of the note and its indorsement were concerned, all question of ratification is eliminated from the case presented to the court. Where acts are not performed by one claiming at the time to act as agent, ratification cannot exist. (31 Cyc. 1251; *Ellison v. Jackson Water Co.*, 12 Cal. 542; *In re Roanoke Furnace Co.*, 166 Fed. 944; *Mattocks v. Young*, 66 Me. 459.)

Appellant is relying upon a contractual obligation, an obligation arising, if at all, independent of the relation of principal and agent. (*Thomson v. Thomson*, 76 App. Div. 178, 78 N. Y. Supp. 389; *Sharp v. Hoopes*, 74 N. J. L. 191, 64 Atl. 989.)

A mere statement of intention made without intention to contract is not such an offer as may be turned into an agreement by acceptance. (9 Cyc. 276.) Without an acceptance an offer gives rise to no obligation. (9 Cyc. 244, 247, 254.) *Gleason v. Dyke*, 22 Pick. (39 Mass.) 390, cited by appellant, has been overruled. The Massachusetts cases support respondent's contention. (*Massachusetts Mut. Life Ins. Co. v. Green*, 185 Mass. 306, 70 N. E. 202; *Moore v. Elmer*, 180 Mass. 15, 61 N. E. 259, 260.)

The New York cases are in line with the weight of authority on past consideration in general. (*People v. Barker*, 17 Misc. 497, 41 N. Y. Supp. 237; *Perkins v. Smith*, 83 App. Div. 630, 81 N. Y. Supp. 955; *Blanshan v. Russel*, 32 App. Div. 103, 52 N. Y. Supp. 963, 161 N. Y. 629, 55 N. E. 1093; *Myers v. Dean*, 11 Misc. 368, 32 N. Y. Supp. 237, 238; *Sheperd v. Young*, 8 Gray (74 Mass.), 152, 69 Am. Dec. 242; *Collins v. Martin*, 43

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Kan. 182, 23 Pac. 95; 9 Cyc. 360, 361; *Gardner v. Schooley*, 25 N. J. Eq. 150; *Updike v. Titus*, 13 N. J. Eq. 151.)

If a promise is made because of a sense of honor, that of itself will not constitute a valuable consideration. (*Morris v. Norton*, 75 Fed. 912, 21 C. C. A. 553.)

Where benefits are conferred without a request, express or implied, a subsequent promise to pay therefor is not supported by a consideration. (*Cook v. Bradley*, 7 Conn. 57, 18 Am. Dec. 79; *Carson v. Clark*, 1 Scam. (2 Ill.) 113, 25 Am. Dec. 79; *Boston v. Dodge*, 1 Blackf. (Ind.) 19, 12 Am. Dec. 205; *Warren v. Whitney*, 24 Me. 561, 41 Am. Dec. 406; *Woodburn v. Renshaw*, 32 Mo. 197; *Savage v. Burns*, 3 Mont. 527, 531; *Wilson v. Edmonds*, 24 N. H. 517, 546; *Sharp v. Hoopes*, 74 N. J. L. 191, 64 Atl. 989; *Bailey v. Rutjes*, 86 N. C. 517; *Whitall v. Morse*, 5 Serg. & R. (Pa.) 358; *Shepard v. Rhodes*, 7 R. I. 470, 84 Am. Dec. 573; *McCord v. Dodson*, 10 Heisk. (57 Tenn.) 440; *Davis v. Anderson*, 99 Va. 620, 39 S. E. 588; 9 Cyc. 356-360, and numerous cases cited; 22 Cyc. 83.)

BUDGE, J.—This action was brought by F. A. Blackwell against R. F. Kercheval, public administrator, as administrator of the estate of Wilson Kistler, deceased, to recover judgment against said estate for the sum of \$29,500.48 with interest.

To the second amended complaint a general demurrer was sustained by the trial court, and upon refusal of plaintiff to further amend his complaint, judgment of dismissal was entered, from which judgment this appeal is taken.

Omitting the formal parts, and the general allegations of the appointment of R. F. Kercheval, public administrator, as administrator of the estate of Wilson Kistler, deceased, the material allegations of the complaint are that, on or about June, 1909, Kistler besought the plaintiff, Blackwell, to sell certain common stock of the Spokane & Inland Empire Railway Company owned by him amounting to 510 shares, and authorized plaintiff to negotiate and consummate the sale thereof; that the plaintiff sold the stock to one Davidson for

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\$24,480, and accepted the note of Davidson for this amount in payment of the stock.

The transaction between Blackwell and Davidson was completed on November 1, 1909, and on the following day, to wit, November 2, 1909, Blackwell wrote a letter to Kistler at Lock Haven, Pennsylvania, in which he advised Kistler of the sale of the stock to Davidson and that Davidson had given him a note for the proceeds, and in concluding his letter stated: "I have accepted this note and turned same over to the Blackwell Lumber Co. Mr. Davidson is worth the money and I think will meet the note. This is a chance the Blackwell Lumber Co. has taken, or rather that I took, as I have indorsed the note."

Kistler, on November 8, 1909, addressed a letter to Blackwell, in which he stated: "I hardly expected that you would take the trouble in closing up the matter and go as far as you did in reaching a conclusion where a body might have supposed there would have been enough interest with the representatives of the Inland Empire Railroad Co., to at least have made an effort to protect innocent stockholders. I would not expect that you should take any chances in the closing of this matter, and if in the future anything should turn up with this that would cause you any inconvenience, if you will please let me know, I will take the matter up and see that you are fully protected."

It is then alleged in the complaint that the note in question was not in fact turned over to the Blackwell Lumber Company, but, under instructions from Kistler, the note itself was indorsed by the plaintiff and sold by him to the Old National Bank of Spokane, Washington, and the proceeds thereof paid over to the Blackwell Lumber Company to apply upon the capital stock subscribed by Kistler; that Davidson paid the interest on his note to June 29, 1910, but has never paid the principal or any other interest, and the plaintiff has been unable to secure the payment thereof, and that because of his indorsing the note, the plaintiff was required to renew the same; that later Davidson executed two notes in place of the original note, one for \$12,000 and one for \$12,480, and that

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the plaintiff was required to pay the note of \$12,480 and the \$12,000 is still unpaid; and that plaintiff will be required to pay the same because the said Davidson is unable to pay it; that the plaintiff has paid to the bank in interest the sum of \$4,920.48.

It is further alleged that the matter was carried along, by an agreement and understanding between the plaintiff and Kistler, in the plaintiff's name, in the hope plaintiff would be able to procure from Davidson, or through Davidson from one J. P. Graves, the principal and interest on the note; that subsequent to receiving the letter bearing date November 8, 1909, signed by Kistler and addressed to plaintiff, on at least two occasions Kistler renewed the agreement set forth in this letter, stating that if after such efforts the plaintiff could not recover, then Kistler would take the matter up and make a settlement with this plaintiff, so that he would not be losing anything by the transaction.

Plaintiff alleges that he made every effort in his power, prior to bringing this action, to obtain the money due on the note from Davidson and Graves, and continued to carry this transaction along and pay the interest upon the notes according to the agreement between the plaintiff and Kistler.

Plaintiff further alleges the presentation of his claim to the administrator of the estate of Kistler, deceased, and the rejection thereof.

Counsel for appellant makes three specifications of error:

First, "The court erred in sustaining the demurrer of the defendant to the second amended complaint of the plaintiff."

Second, "The court erred in holding that the second amended complaint did not state facts sufficient to constitute a cause of action."

Third, "The court erred in entering judgment in favor of defendant and against the plaintiff."

The plaintiff's claim to reimbursement is based upon three propositions:

(a) That even if the plaintiff did exceed his authority in accepting a note for the stock of Mr. Kistler, he fully reported the transaction to the principal and the principal, with full

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knowledge, ratified the act of his agent and expressly agreed to indemnify him.

(b) The principal, with full notice and knowledge that the agent had accepted the note from Davidson, had indorsed and sold the note, and with full knowledge of all of the other facts, accepted the benefit of the negotiation and sale of the Davidson note, received and held the stock of the Blackwell Lumber Company, and further wrote Mr. Blackwell in effect that he would indemnify him.

(c) On at least two occasions subsequent to 1909, Mr. Kistler requested Mr. Blackwell to continue to handle the transaction, and again reiterated his promise to hold Mr. Blackwell harmless against loss. In other words, approved, not only what he had already done, but asked him to perform some other services in the matter.

For the purpose of disposing of this demurrer, every material allegation of the plaintiff's complaint which is well pleaded must be taken as true.

From the allegations in the complaint, it appears that Kistler requested Blackwell to sell the common stock of the Spokane & Inland Empire Railway Company owned by him. In pursuance of Kistler's wishes Blackwell sold the stock in question to Davidson, and, in consummating said sale, acted as the agent of Kistler. As held in the case of *Pouppirt v. Greenwood*, 48 Colo. 405, 110 Pac. 195: "An 'agent' is one who acts for or in place of another by authority from him, or who is intrusted with the business of another." And in the case of *Echols v. State*, 158 Ala. 48, 48 So. 347: "An agent is one who undertakes to transact some business, or to manage some affair for another by the other's authority and to account to him for it."

Under the allegations of the complaint, it must be conceded that, in accepting Davidson's note in lieu of cash, Blackwell exceeded his authority as the agent of Kistler. This brings us to the question; Did Kistler ratify the sale made by his agent Blackwell to Davidson? A principal may ratify an unauthorized act of his agent if, at the time of the ratification, he has knowledge of all of the facts surrounding, and con-

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nected with, the transaction. In the case of *Drakely v. Gregg*, 8 Wall. (U. S.) 242, 19 L. ed. 409, the court said: "If, with a full knowledge of the facts concerning it, a person ratify an agreement which another person has improperly made, concerning the property of the person ratifying, he thereby makes himself a party to it, as much so as if the original agreement had been made with him. No new consideration is required to support the ratification." In the case of *Osborne v. Durham*, 157 N. C. 262, 72 S. E. 849, the court applied the doctrine that "Agents to sell stock received notes and orders in payment therefor instead of cash, without express authority from their principal, and after the nonpayment of a draft on the corporation, which they had instructed their principal to draw, one of them gave his individual note for the amount, which was accepted, and proved the principal's claim under the draft against the insolvent estate of the corporation, with the knowledge and expressed satisfaction of the principal, who also requested the maker of the note for advances to be credited thereon. Held, that there was a complete ratification of the sale.

"A principal's ratification of the act of his agent requires no new consideration.

"An act of an agent may be ratified by the words or conduct of his principal indicating an intention on the part of the principal to adopt the act as his own.

"Where a ratification of the acts of an agent is made with knowledge of the facts, it invests principal and agent with the same rights and duties as if the transaction had been previously authorized, and the agent is thereby absolved from all responsibility on account of the unauthorized act or conduct, whether he exceeded or departed from his instructions, or was a mere volunteer."

The principles promulgated in *Mechem on Agency*, 2d ed., vol. 1, are: (1) "Sec. 350. Ratification is an approval of a previous act or contract, which thereby becomes the act or contract of the person ratifying." (2) "Sec. 352. Ratification is ordinarily a matter which is wholly optional with the principal. An act has been done which, . . . was unauthor-

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ized. The principal may ratify it or he may repudiate it. . . . No matter how advantageous ratification might be to himself or to the other party or to the agent, the principal is under no legal duty to ratify the act." (3) "Sec. 354. It is, therefore, the general rule that one may ratify the previous unauthorized doing by another in his behalf, of any act which he might then and could still lawfully do himself, and which he might then and could still lawfully delegate to such other to be done."

It is well settled that, if the principal ratify a contract made by an agent, the substituted terms become a part of the original agreement or authorization. Based upon the allegations of the complaint in this case, we are satisfied that the entire transaction consummated by Blackwell, with reference to the sale of Kistler's stock in the Inland Empire Railway Company to Davidson who, instead of paying cash, gave his note, was fully understood and authorized by Kistler, and that Blackwell simply acted as the agent of Kistler in this matter. The complaint, in our opinion, sufficiently alleges the act of ratification. In *Mahon v. Rankin*, 54 Or. 328, 102 Pac. 608, 103 Pac. 53, it was held: "An allegation that the principal, with full knowledge of the facts, ratified the agent's unauthorized act is sufficient, without setting out how it was ratified."

It is alleged in the complaint that Kistler had subscribed for \$25,000 capital stock of the Blackwell Lumber Company; that the \$24,480 was applied upon the purchase price of this capital stock, and the balance was remitted by Kistler. It can be reasonably inferred from the complaint that the payment of the \$24,480 guaranteed by plaintiff was at the request of Kistler by reason of his ratification of the entire transaction subsequent to the sale of the stock, and the application of the proceeds to the payment of his subscription to capital stock in the Blackwell Lumber Company. Kistler alone received the benefits of the transaction. There was no consideration moving from him to Blackwell.

In the meantime Davidson had been unable to meet the note which was indorsed by Blackwell and sold to the Old National Bank of Spokane, Washington. It is alleged that Kistler

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knew the note had not been paid by Davidson, and being in possession of such information, he agreed with Blackwell that if he, Blackwell, would carry the transaction along and the money could not be finally realized on the Davidson note, he would save Blackwell harmless from any loss by reason of Davidson's failure to pay the note. This agreement was made subsequent to the letter of November 2, 1909, written by Blackwell to Kistler, and the letter of November 8, 1909, written by Kistler to Blackwell.

We believe the complaint sufficiently alleges the continuation of the transaction and an acknowledgment on the part of Kistler that he ratified all of the acts of his agent Blackwell and considered the entire transaction as his own; even the indorsement of the Davidson note by Blackwell which enabled him to pay for the capital stock that he had subscribed for in the Blackwell Lumber Company. In the case of *Waterson v. Rogers*, 21 Kan. 529, it is held that "One who voluntarily accepts the proceeds of an act done by one assuming, though without authority, to be his agent, ratifies the act, and takes it as his own with all its burdens, as well as its benefits." Kistler, as has been heretofore stated, accepted the benefits of the sale of his stock in the Spokane & Inland Empire Railway Company by receiving the stock in the Blackwell Lumber Company. And upon the theory that one may not take the benefits of a contract made in his behalf and reject the burdens, under the facts alleged in the complaint in this case, it was incumbent upon Kistler to either accept the contract in its entirety or reject it as a whole. He was under no obligation to ratify the sale of the stock to Davidson, had he not so elected, for the reason that Blackwell had no authority to accept this note in lieu of cash. Also he was under no obligation to permit Blackwell to invest the money obtained from the sale of Davidson's note in the capital stock of the Blackwell Lumber Company.

From the allegations of the complaint which, in adhering to the principle above mentioned, we must assume to be true, it appears that, after the money had been invested in the Blackwell Lumber Company's business, and up until the death

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of Kistler, the transaction had not been completed; and Blackwell, by Kistler's request, was to continue to permit the obligation to stand in the Old National Bank, as it was at the time he accepted the note in lieu of cash, and was to continue in his efforts to collect the amount due under the obligation from either Davidson or Graves, and Kistler was to hold Blackwell harmless by reason of the acceptance of Davidson's note.

Where competent evidence adduced is such that reasonable men could draw different conclusions as to whether or not there has been a ratification of unauthorized acts, or the extent of such ratification, the question is one of fact to be determined by the jury under proper instructions from the court, and it is error to sustain a general demurrer to a complaint where it appears from all of the allegations of the complaint that questions of fact are involved. (31 Cyc. 1677.)

In the case of *Fisk Min. & Mill. Co. v. Reed*, 32 Colo. 506, 77 Pac. 240, that court said: "Where there is a request to continue services of a character theretofore rendered, the continuance of such services is a sufficient consideration to support a promise to pay for those rendered prior to such request. (6 Ency. of Law, 2d ed., 694.)" And in the case of *Wolford v. Powers*, 85 Ind. 294, 44 Am. Rep. 16, the court said: "It is quite certain that the request to perform the services, coupled with the promise to pay for them, takes the case out of the rule that no action will lie for services rendered voluntarily or performed gratuitously, and that the same facts take the case out of the rule declaring an executed consideration to be insufficient to support a promise. Whatever may be thought of the reasoning of some of the earlier English cases, it cannot be denied that the conclusion that where there is a request, and continuous services of value are rendered to the person making the request, the consideration is a valid one, and will support a promise to pay for such services, although some of them were rendered prior to the request."

In the case of *Loomis v. Newhall*, 15 Pick. (32 Mass.) 159, the rule is announced that "An entire promise founded partly on a past and executed consideration and partly on an execu-

Points Decided.

tory consideration, is supported by the executory consideration."

In 6 Am. & Eng. Ency. of Law, 2d ed., 694, it is stated that "A consideration which is executed in part only is called a continuing consideration and is valid, the executory portion of it being sufficient to support the entire promise."

We do not deem it necessary in this opinion to discuss or distinguish the principles announced in the authorities cited by learned counsel for respondent from the case at bar. We are not considering this case upon the evidence, but are only concerned with the sufficiency of the allegations of the complaint which, taken as a whole, we must assume to be true for the purpose of determining whether or not a cause of action has been stated. And, from our investigation, based upon this assumption, we are of the opinion that the complaint states a cause of action and the demurrer should have been overruled.

This cause is remanded to the trial court with directions to overrule the demurrer and require the defendant to answer. Costs are awarded to appellant.

Sullivan, C. J., and Morgan, J., concur.

Petition for rehearing denied.

(June 16, 1915.)

STATE, Respondent, v. W. F. KASISKA, Appellant.

[150 Pac. 17.]

INTOXICATING LIQUORS—SALE OF—INJUNCTION—PROHIBITION DISTRICT—
MOTION TO DISSOLVE OR MODIFY.

1. An act approved February 18, 1911 (Sess. Laws, p. 30), is an act supplementing and providing additional means for the enforcement of the provisions of certain acts intended to regulate, restrain, control and prohibit the sale of intoxicating liquors, and provides, among other things, that all places in a prohibition district where intoxicating liquors are sold, furnished, delivered, given

Argument for Appellant.

away or otherwise disposed of in violation of law, etc., are common nuisances; and also provides that the prosecuting attorney of any county where such nuisances exist may maintain an action in the district court, in the name of the state, to abate and perpetually enjoin the same, and that an injunction can be granted at the commencement of an action and no bond shall be required.

2. Under the provisions of said act the prosecuting attorney brought this action and the judge of the fifth judicial district in and for the county of Bannock issued a writ of injunction by which the defendant was enjoined from keeping open or permitting to be kept open the Bannock Hotel, the building in which it was alleged illegal sales of intoxicating liquors were made, and also enjoined the defendant from selling, delivering or otherwise disposing of intoxicating liquors in and about said premises.

3. *Held*, under said act and the allegations of the complaint that the judge did not err in granting said injunction.

4. *Held*, that the injunction issued was a temporary one and was only intended to continue until the final hearing of the case unless sooner modified by the court or judge.

5. *Held*, under the facts in this case that the court did not err in denying the motion to dissolve or modify said injunction.

APPEAL from the District Court of the Fifth Judicial District for Bannock County. Hon. J. J. Guheen, Judge.

Action to have the Bannock Hotel building in the city of Pocatello adjudged and declared to be a common nuisance and to enjoin the defendant from selling intoxicating liquors in said hotel. Temporary injunction granted. Motion to dissolve or modify denied. *Affirmed*.

Perky & Crow and R. M. Terrell, for Appellant.

The effect of the judgment granted was to completely abate the place alleged to have been a nuisance. This cannot be properly done upon an injunction issued *ex parte* at the time of the filing of the complaint. The effect of closing down the place where the purported sales were made is to grant to the plaintiff a final decree before any hearing whatever upon the issues involved. This cannot legally be done. (*Teutonia Club v. Howard*, 141 Ga. 79, 86 S. E. 290; *Arnold v. Bright*, 41 Mich. 207, 2 N. W. 16; *Consolidated Vinegar Works*

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v. Brew, 112 Wis. 610, 88 N. W. 603; *Weaver v. Toney*, 107 Ky. 419, 54 S. W. 732, 50 L. R. A. 105; *Becker v. Gilbert* (N. J.), 60 Atl. 29; *Forman v. Healey*, 11 N. D. 563, 93 N. W. 866; 22 Cyc. 740, 741.)

Only so much of the objectionable thing can be removed as was actually responsible for the nuisance. (29 Cyc. 1217.)

The practice seems to be, even in those states having the most rigid abatement laws, to issue the injunction forbidding the selling of liquor in the hotel in which the nuisance is alleged to exist. (*Cooley v. Charles Hotel* (Iowa), 130 N. W. 115.)

The proper conduct of a lawful business cannot be enjoined. (*Village of American Falls v. West*, 26 Ida. 301, 308, 142 Pac. 42.)

Where a business is not *per se* a nuisance or unlawful, it is always safer for the court to make its injunction only broad enough to prohibit a continuance of the business in such a manner or under such conditions or circumstances as to annoy or be offensive to the party aggrieved. (*Lorenzi v. Star Market Co.*, 19 Ida. 681 (bottom of page), 115 Pac. 490, 35 L. R. A., N. S., 1142.)

The court upon an *ex parte* proceeding cannot deprive a man of his property. (*McConnell v. McKillip*, 71 Neb. 712, 115 Am. St. 614, 99 N. W. 505, 65 L. R. A. 610, 8 Ann. Cas. 898; *Modern Loan Co. v. Police Court*, 12 Cal. App. 582, 108 Pac. 56.)

J. H. Peterson, Atty. Genl., E. G. Davis and T. C. Coffin, Assistants, C. D. Jones and McDougall & Smith, for Respondent.

Under the authorities in a matter of this kind, the issuance of the restraining order runs clearly to the abatement of the place as a nuisance rather than to the commission of unlawful acts, namely, the selling of intoxicating liquor in dry territory. This clearly follows from the provisions of sec. 2 of the search and seizure act, quoted above, wherein certain "places" are declared to be "common nuisances," and it is the maintenance of these places as common nuisances which

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courts are authorized to enjoin by the issuance of an injunction at the commencement of the action. (*Carleton v. Rugg*, 149 Mass. 550, 14 Am. St. 446, 22 N. E. 55, 5 L. R. A. 193; *Littleton v. Fritz*, 65 Iowa, 488, 54 Am. Rep. 19, 22 N. W. 641; *Pontius v. Bowman*, 66 Iowa, 88, 23 N. W. 277; *State v. Nelson*, 13 N. D. 122, 99 N. W. 1077; *State v. Massey*, 72 Vt. 210, 47 Atl. 834; *Commonwealth v. Purcell*, 154 Mass. 388, 28 N. E. 288.)

Defendant's right to operate a hotel is to operate it in a wholly lawful manner, and where legitimate operations are coupled with unlawful transactions, as the record shows to have been the facts in this case, it is a matter which must rest in the sound discretion of the trial court to determine whether the whole operation of the hotel should be enjoined, or only a part thereof. (*Flood v. Goldstein*, 158 Cal. 247, 110 Pac. 916; *Klein v. Davis*, 11 Mont. 155, 27 Pac. 511; *Cotter v. Cotter*, 16 Mont. 63, 40 Pac. 63; *Cunningham v. Ponca City*, 27 Okl. 858, 113 Pac. 919; *Stowe v. Powers*, 19 Wyo. 291, 116 Pac. 576; *Anderson v. Eagleheart*, 18 Wyo. 409, 108 Pac. 977.)

The constitutional guaranty of due process of law does not affect the police power of the state, inasmuch as the police power itself is deemed due process of law. (*Lawton v. Steele*, 119 N. Y. 226, 16 Am. St. 813, 23 N. E. 878, 7 L. R. A. 134; *In re Newell*, 2 Cal. App. 767, 84 Pac. 226; *Garland Novelty Co. v. State*, 71 Ark. 138, 71 S. W. 257; *Board of Police Commrs. v. Wagner*, 93 Md. 182, 86 Am. St. 423, 48 Atl. 455, 52 L. R. A. 775; *Cartwright v. City of Cohoes*, 56 N. Y. Supp. 731, 39 App. Div. 69, 165 N. Y. 631, 59 N. E. 1120; *Ex parte McCue*, 7 Cal. App. 765, 96 Pac. 110; *North American Cold Storage Co. v. Chicago*, 151 Fed. 120, 211 U. S. 306, 29 Sup. Ct. 101, 53 L. ed. 195, 15 Ann. Cas. 276; *Knight & Jillson Co. v. Miller*, 172 Ind. 27, 87 N. E. 823, 18 Ann. Cas. 1146; *State v. Dannenberg*, 151 N. C. 718, 66 S. E. 301, 26 L. R. A., N. S., 890; *Pittsburg C. C. & St. L. R. Co. v. State*, 180 Ind. 245, 102 N. E. 25; *Hiller v. State* (Md.), 92 Atl. 842; *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. ed. 205.)

SULLIVAN, C. J.—This is an appeal from an order granting an injunction or restraining order, and also from an order

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refusing to dissolve or modify the same. This proceeding was brought under the provisions of secs. 2 and 4 of an act to supplement, strengthen and provide additional means for the enforcement of the provisions of certain acts intended to regulate, restrain, control and prohibit the sale of intoxicating liquors, approved Feb. 18, 1911 (Sess. Laws 1911, p. 30). Said sections are as follows:

"Sec. 2. All places in a prohibition district of the state of Idaho where intoxicating liquors are sold, furnished, delivered, given away, or otherwise disposed of in violation of law; or where persons are permitted to resort for the purpose of drinking intoxicating liquors as a beverage; or where intoxicating liquors are kept for sale, delivery or disposition in violation of law, and all intoxicating liquors, vessels, glasses, kegs, pumps, bars and other property kept in and used in maintaining such a place, are hereby declared to be common nuisances, and every person who maintains or assists in maintaining such common nuisance is guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not less than twenty-five dollars (\$25), nor more than five hundred dollars (\$500), or by imprisonment in the county jail for not less than ten (10) days nor more than six (6) months, or by both such fine and imprisonment for each offense."

"Sec. 4. The prosecuting attorney of any county where such a nuisance, as defined in section 2 of this act, exists, or is kept or maintained, may maintain an action in the district court of such county in the name of the state of Idaho to abate and perpetually enjoin the same. The injunction shall be granted at the commencement of the action and no bond shall be required. Any person violating the terms of such injunction shall be punished for contempt by a fine of not less than one hundred dollars (\$100), nor more than five hundred dollars (\$500), or by imprisonment in the county jail for not less than thirty (30) days nor more than six (6) months, in the discretion of the court or judge thereof."

It is alleged in the complaint that the defendant, Kaskiska, was the owner and in the possession of what is known as the

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Bannock Hotel, situated in the city of Pocatello, and that during all of the times mentioned in the complaint said hotel was used for the sale of intoxicating liquors, and that for the purpose of carrying on said business and concealing the same from the public generally, the lobby, bar-room, halls, stairways, card-rooms and other rooms of said hotel were used for said purpose with the full knowledge and consent of the defendant, and that the use of said hotel as set out in said complaint makes and constitutes the same a common nuisance, under the provisions of the statutes of the state. The complaint prays that said hotel be adjudged a common nuisance and that an order issue directing the sheriff to shut up and abate said place, and that in the meantime defendant may be enjoined, until the further order of the court, from keeping open or permitting to be open, said hotel, and from selling, delivering or otherwise disposing of or giving away or from keeping for sale, delivery or disposition or use in and about said premises, any malt, vinous, spirituous, fermented or other intoxicating liquor, or from permitting such liquors to be sold, delivered, given away or otherwise disposed of in violation of law.

Said complaint was duly verified by the prosecuting attorney of said county, and the judge of said district, after considering said complaint, made the following order:

“It is therefore ordered by me, J. J. Guheen, judge of the district court of the fifth judicial district of the state of Idaho, in and for the county of Bannock, that until further order in the premises, you, the said W. F. Kasiska, and all your counselors, attorneys, solicitors, employees and agents, and all others acting in aid or assistance of you, and each and every of you, are hereby restrained and enjoined from keeping or permitting to be opened the Bannock Hotel building, situate on lots 1, 2 and 3 in block 487 in the city of Pocatello, county of Bannock, state of Idaho, and from selling, delivering, or otherwise disposing of intoxicating liquors in and about said premises.”

Thereafter a motion was made to dissolve or modify said injunction on several grounds, the first of which was that

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the complaint does not state facts sufficient to authorize any injunctive relief and in particular that portion of the order of injunction restraining the defendant and his counselors, etc., from keeping and permitting to be kept open the said Bannock Hotel building; that said injunctive order is in violation of certain provisions of the constitution of the United States and of the state of Idaho; that said injunctive relief granted is inequitable and disproportionate to the necessity for any injunctive relief, and particularly in that the part of the hotel building in which the common nuisance is alleged to have been permitted is but a small portion of said building.

This motion was based on the complaint, affidavits and numerous court records which show that many prosecutions have been made against appellant during the past four years for the illegal sale of intoxicating liquors. The record shows the numerous pleas of guilty entered by the appellant in those cases, the fines assessed and the assurances given by the appellant to the court "upon his honor as a man," that he would no longer violate the law forbidding the sale of intoxicating liquors, and that there are a number of charges for the illegal sale of intoxicating liquors now pending against him in said county. The record also shows that about three years ago a criminal judgment was pronounced against the appellant and he paid a fine of \$500 assessed against him, and about a year later he again appeared in the district court charged with several separate and distinct violations of the law, and upon pleas of guilty was fined \$1,000, and at that time, upon his statement in open court, "upon his honor as a man" that he would no longer violate the intoxicating liquor laws, other indictments then pending against him were dismissed.

The record shows that the appellant is the owner and proprietor and was running said Bannock Hotel, prior to the granting of said injunction, and that said Bannock Hotel has been used as a place for the sale of intoxicating liquors in violation of law. The provisions of sec. 2 of said act were clearly intended to remedy the evil which induced its enactment and its language is broad enough to cover the particular

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phase of the evil arising from the conduct of a hotel as the Bannock Hotel was conducted and run.

The guests of the hotel, or many of them, received liquor from the bar whenever they desired, and the hallways of the hotel in the mornings showed a number of empty bottles sitting outside of the different doors. There apparently was not much secrecy in regard to the matter, and it appears that the appellant, regardless of the many fines and his solemn promises made to the court that he would cease the business, was determined to continue the illegal sale of intoxicating liquors and that said hotel premises was the place where he carried on this illegal traffic.

But it is contended by counsel that the injunctive order made closes up the hotel so that the appellant cannot carry on the hotel business in a lawful or legitimate way and thus deprives him of his property without due process of law.

There is nothing in that contention under the facts of this case, since the injunction issued is only temporary and will only continue until the final hearing of the case, unless sooner modified by the court or judge. Under ordinary circumstances the restraining order might appear a little drastic, but when we come to consider the record and the reckless violation of the law by the appellant, we do not think the court erred in granting the injunction as it did, which, no doubt, when the case is heard on its merits will be so modified as to permit a legitimate business to be carried on in that hotel building.

If the guests in a hotel in a prohibition district are to be given the services of a saloon because of their registering at or patronizing the hotel, then the hotel is not a cloak to hide the illegal sale of liquor, but it is a means to an end, an instrumentality inseparably connected with a part of the business of selling liquor. In this view it becomes as much a common nuisance as the room in which the liquor is kept and from whence it is sold.

The definition of common nuisance as given in sec. 2 of said act clearly and unequivocally includes just such places as a hotel which is used in the manner the record shows this

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hotel has been used. The record shows that this hotel is not maintained and kept as a legitimate hotel but as an adjunct for the carrying on of an illegal traffic in liquor. In that view of the case, an injunction requiring its discontinuance as a place where intoxicating liquors are sold would have the effect of closing the hotel until a hearing is had on the merits of the case. The illegal selling of liquor was its principal or chief use at the times mentioned in the complaint, as shown by the record.

No doubt, if on the final hearing the court should determine and adjudge that the defendant could not use the hotel building for any purpose whatever, it would be the taking of property without due process of law, and that action of the court would be held void. But it is a principle universally recognized that the constitutional guaranty of "due process of law" does not affect the legitimate police power of the state, inasmuch as such power is deemed "due process of law." When drastic measures are required to enforce the law, such measures may be temporarily used in abating a public nuisance.

The state is not seeking in this action to forfeit the title to said property to the state, and the statute provides for no forfeiture. It simply provides for the abatement of what the legislature considered a moral disease and a nuisance to the public, in the same sense that our health statutes provide for a quarantine against physical disease. The trial judge no doubt arrived at the conclusion that said hotel as managed by the defendant was in and of itself a nuisance which the state ought to abate. It was not the bar-room; it was not the drinking of liquor; it was not the open and notorious violation of the law; it was simply the hotel itself, which from the manner and method of its use became a nuisance within the meaning of sec. 2 of said act. Such being the case, the fourteenth amendment to the United States constitution guaranteeing due process of law does not abridge or affect in any way the power of the state to abate such a nuisance as the said hotel is shown to be by the method and manner in which it was conducted.

Argument for Appellants.

We therefore conclude that said provisions of the sections of said act above quoted are constitutional when given a reasonable construction, and do not deprive the defendant of due process of law, and that the trial court did not exceed its jurisdiction and did not err in granting said injunction to continue until the final determination of said case, or until the further order of the court.

The orders appealed from are affirmed, with costs in favor of the state.

Budge and Morgan, JJ., concur.

(June 17, 1915.)

W. W. PAPESH and A. E. COWLES, Appellants, v. P. B. WEBER and J. H. WEBER, Respondents.

[149 Pac. 1064.]

REAL ESTATE—ACTION IN EJECTMENT—ADMISSION OF EVIDENCE—FINDINGS—SUFFICIENCY OF EVIDENCE—LAW APPLICABLE TO FACTS.

1. *Held*, that it was not error for the court to admit in evidence Exhibit No. 2, which was a plat of the land in question prepared by surveyor Trask showing a description of the land in question.

2. The evidence *held* sufficient to support the finding of facts, and *held* that the court applied the correct rule of law to such facts in entering judgment in favor of the defendants.

APPEAL from the District Court of the First Judicial District for Shoshone County. Hon. W. W. Woods, Judge.

Action in ejectment to recover possession of certain real estate. Judgment for defendants. *Affirmed*.

Walter H. Hanson, for Appellants.

The engineer who made the survey for the defendants admitted that his plat did not conform to the original plat of

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the tract in question; that he had not tied his survey to any permanent monument or government survey, and that it was otherwise unreliable. Such a survey is not a legal survey and cannot be accepted in court. (*Boise Valley Const. Co. v. Kroeger*, 17 Ida. 384, 105 Pac. 1070, 28 L. R. A., N. S., 968; *Bayhouse v. Urquides*, 17 Ida. 286, 105 Pac. 1066.)

Franklin Pfirman, for Respondents.

There was a substantial conflict in the evidence, that of appellant being for the most part parol testimony intended to vary the contents of written instruments. A large part of it was irrelevant and inadmissible. On the respondent's part most of the evidence consisted of written muniments of title. On this conflicting evidence the court below found for respondents. Where there is a substantial conflict in the evidence, the findings of the trial court will not be disturbed. This has been so repeatedly held by this court that a citation of authorities is not necessary.

SULLIVAN, C. J.—This action was brought to quiet title to .065 of an acre of land situated in the city of Kellogg, Shoshone county, and the complaint contained the usual allegations in such an action.

The defendants filed their answer denying the material allegations of the complaint and by way of cross-complaint set up their claim to the title and right to possession of said land and asked to have their title quieted to the same. The cause was tried to the court and finding of facts made and judgment entered in favor of defendants, decreeing them to be the owners in fee simple of said premises and entitled to the possession thereof. The appeal is from the judgment.

The assignments of error refer to the action of the court in receiving certain evidence and making certain finding of facts and entering judgment in favor of the defendants.

It is first contended that the court erred in admitting in evidence defendants' Exhibit No. 2, which exhibit was prepared by surveyor Trask, showing a description of the land

Points Decided.

in question in connection with other land. There is no error in the action of the court in admitting that exhibit.

Counsel for appellant contends that the only practical problem confronting the court is the construction of the law applicable to the facts and that there is no material conflict in the evidence introduced on the trial. As we view it, there is a substantial conflict in the evidence, since some of the evidence introduced by the plaintiffs was intended to and does contradict the contents of written instruments which had been introduced in evidence.

After an examination of the entire record, we are satisfied that the finding of facts is fully supported by the evidence and that the court did not err in making such finding of facts, and under the law applicable to such facts the court did not err in entering judgment in favor of the defendants.

The judgment must therefore be affirmed, with costs in favor of respondents.

Budge and Morgan, JJ., concur.

(June 18, 1915.)

D. L. EVANS et al., Constituting the State Board of Education and the Board of Regents of the University of Idaho, Plaintiffs, v. FRED L. HUSTON, State Auditor, Defendant.

[150 Pac. 14.]

MANDATE—STATE AUDITOR—ALBION NORMAL SCHOOL FUND—INCOME ACCRUING THEREFROM—LEGISLATIVE APPROPRIATION OF—CONSTITUTIONAL AND STATUTORY CONSTRUCTION.

1. Sec. 13, art. 7, of the state constitution, provides that no money shall be drawn from the treasury but in pursuance of the appropriations made by law.

2. The first section of the appropriation act of 1913 (Sess. Laws 1913, p. 637) makes an appropriation for the support and maintenance of the several state institutions for the period commencing

Argument for Petitioner.

on the first Monday in January, 1913, and ending on the first Monday of January, 1915, and provides "That the amounts specifically appropriated for stated purposes by this act constitute the whole amount appropriated and to be used for any purposes during the years 1913 and 1914."

3. Said sec. 13, art. 7, of the constitution, prohibits the state auditor from drawing his warrant upon any fund in payment of any claim until a proper legislative appropriation is made for the payment of such claim.

4. Under the provisions of the fourth section of an act creating and establishing a normal school fund (Sess. Laws 1905, p. 393), it is provided: "That perpetually from and after the first day of January, 1907, one-half of all moneys which may accrue to the said normal school fund shall be, and the same are hereby, appropriated and set apart for the support and maintenance of the said Albion State Normal School and the same shall be, and they are hereby, made available for such purpose immediately upon their being credited to the said fund."

5. Under the provisions of subd. 66, sec. 17, of the Rev. Codes, said act of 1905 establishing the normal school fund was continued in force.

6. Secs. 3 and 7 of said act of 1905 make appropriations of certain funds.

7. The act of 1905 makes an appropriation of the income accruing from said school fund and continues such appropriation until amended or repealed by the legislature.

8. *Held*, that the balance remaining in said Albion State Normal School fund and the income from that fund during the years 1915 and 1916 have been appropriated for the support and maintenance of said normal school, and are available for that purpose.

An original proceeding in this court for a writ of mandate to compel the state auditor to draw his warrant for the payment of the January, 1915, salary for the principal of the Albion Normal School and to charge the same against the Albion Normal School fund which had accrued previous to the first day of January, 1915. After hearing, peremptory writ granted.

Geo. C. Huebener, for Petitioner.

If, at the end of any biennium, there is an unexpended balance in any of specified school funds, it should still be there

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subject to the use of the specified schools and cannot be diverted into the "general fund," or any other fund, nor can it be appropriated for any other purpose, nor is any further legislative action required to dispose of it, nor can the state auditor refuse to follow the direction of the state board of education, when such direction is within the express terms of the grant and of the several legislative acts; nor can he, under any circumstances whatsoever, divert any portion of the "unexpended balance" to the "general fund" or to any other fund; and the unexpended balance must always remain in the fund available for the use of the Albion Normal School. (*State v. Fitzpatrick*, 5 Ida. 499, 51 Pac. 112; *Roach v. Gooding*, 11 Ida. 244, 81 Pac. 642; *State v. Maynard*, *State Treasurer*, 31 Wash. 132, 71 Pac. 775; *Sheldon v. Purdy*, 17 Wash. 135, 49 Pac. 228; *Mitchell v. Colgan*, 122 Cal. 296, 54 Pac. 905; *State v. McMillan*, 12 N. D. 280, 96 N. W. 310; *State v. Board of Regents of University*, 55 Kan. 389, 40 Pac. 656, 29 L. R. A. 378; *Wyman v. Banward*, 22 Cal. 524.)

J. H. Peterson, Attorney General, T. C. Coffin, E. G. Davis and Herbert Wing, Assistants, for the Defendant, cite no authorities.

SULLIVAN, C. J.—This is an original application to this court for a writ of mandate to Fred L. Huston, as auditor of the state of Idaho, to require the defendant as such auditor to issue a state warrant in payment of the January, 1915, salary to G. A. Axline, principal of the Albion Normal School, and to charge the same against money of the Albion Normal School fund which had accrued thereto previous to the first day of January, 1915. A sufficient part of said fund to pay said warrant remained in said fund on said date.

The alternative writ was issued and the return made thereto, admitting the main allegations thereof and averring that all of the provisions of the general appropriation act for the biennium of 1913 and 1914 must be construed together, and that the provisions of said act place the income accruing to the Albion Normal School from its endowment fund upon

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exactly the same basis as the appropriations made in the said act from the general fund in the state treasury, and under the provisions of the first paragraph of sec. 1 of said act, such appropriations are made "for the support and maintenance of the several state institutions for the period commencing on the first Monday of January, 1913, and ending on the first Monday of January, 1915," and for no other period, and prays that the temporary writ of mandate be denied.

It is the position taken by the state auditor in this proceeding that in view of the provisions of sec. 13, art. 7, of the state constitution, to wit, "No money shall be drawn from the treasury, but in pursuance of appropriations made by law," and the statutes, that the income accruing to the Albion Normal School during the biennium of 1913 and 1914 and not expended in the payment of claims originating in that biennium cannot be used for claims arising in the biennium of 1915 and 1916 unless the same has been made especially available for this purpose by direct appropriation of the legislature. In other words, the position of the auditor is that in view of the proviso found in sec. 6 of chap. 193 (Sess. Laws 1913, p. 637) (commonly known as the general appropriation act), the income accruing to the Albion Normal School during the biennium of 1913 and 1914 was appropriated to that institution for that biennium and was made subject to the provisions of the general appropriation act, limiting the appropriations made for that biennium to the payment of claims arising therein, and prohibiting their use at any other time or for any other purpose, at least until a lawful appropriation was made of them by the legislature.

In the first section of said act we find the following provision:

"That the following sums of money, or so much thereof as may be necessary, are hereby appropriated for the payment of salaries and compensation of the state officers and employees of the state of Idaho and the general expenses of state government, and for the support and maintenance of the several state institutions for the period commencing on the first Monday of January, 1913, and ending on the first

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Monday of January, 1915. . . . That the amounts specifically appropriated for stated purposes by this act constitute the whole amount appropriated, and to be used for any purposes during the years 1913 and 1914."

That section construed with sec. 13, art. 7, of the constitution above quoted does not permit the auditor to draw his warrant upon said fund until a proper appropriation is made of the balance remaining in said fund after the payment of claims originating during the biennium of 1913 and 1914.

The sole question for determination by this court is whether or not the position of the state auditor is correct, or if a legal appropriation of said funds has been made by the legislature.

It is contended by counsel for plaintiffs that under the statutes there is a continuing appropriation of said funds and that warrants may be drawn upon them for all legal claims against such funds without any further legislative appropriation. In order to determine this matter, we shall have to refer to certain enactments of the legislature touching the question here at issue.

By the fourth section of the act creating and establishing a normal school fund, etc. (Sess. Laws 1905, p. 393), it is provided "That perpetually from and after the first day of January, 1907, one-half of all moneys which may accrue to the said normal school fund shall be, and the same are hereby, appropriated and set apart for the support and maintenance of the said Albion State Normal School and that the same shall be, and they are hereby, made available for such purpose immediately upon their being credited to the said fund." By that act the legislature has attempted to perpetually appropriate and set apart for the support of the Albion Normal School the fund therein mentioned. Of course, that act is not binding on any subsequent legislature, or at least not so binding as to prevent them from amending it.

Subd. 66 of sec. 17 of the Rev. Codes, which were adopted in 1909, continued in force said act of 1905 establishing the normal school fund. The general appropriation act of 1905 (Sess. Laws, p. 277) contains the following section:

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"Sec. 3. That all moneys belonging to funds created by law for specific purposes are hereby appropriated for such purposes."

In sec. 7 of said act the following proviso is found:

"That the income accruing to any state institution after the same has been certified quarterly to the board of trustees of such institution by the auditor shall be deemed an appropriation to such institution, and shall be governed by the provisions of this act regarding appropriations and regarding the creation of indebtedness in excess of such appropriations."

The general appropriation act for the biennium of 1907 and 1908 (Sess. Laws 1907, p. 457) contains identically the same provisions above quoted from the general appropriation act of 1905. The general appropriation act of 1909 (Sess. Laws, p. 134) contains similar provisions. Said sec. 3 of the general appropriation acts of 1905, 1907 and 1909 is not found in the general appropriation act of 1911 (Sess. Laws, p. 319), nor in the general appropriation act of 1913 (Sess. Laws, p. 637). In both of the later acts, however, the second provision above quoted from the general appropriation act of 1905 and repeated in subsequent appropriation acts appears.

The general appropriation act of 1915 does not contain either of those provisions, although they appear in the bill as it was originally introduced, but were stricken out.

There is no question but that the act of 1905, quoted above, which created the normal school fund and perpetually appropriated the income accruing from said fund to the uses of the normal schools of this state, is a sufficient appropriation of this income for the purposes of those institutions until repealed by the legislature, and the only question to be determined in this proceeding is whether or not the language used in the general appropriation act of 1913 constitutes a limitation of such appropriations,—such a limitation as will render it impossible to use in the biennium of 1915 and 1916 any part of the income accruing in the biennium of 1913 and 1914 without a special appropriation by the legislature.

The first section of said appropriation act of 1913 is above quoted, and among other things it provides that the amounts

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specifically appropriated for stated purposes by said act constitute the whole amount appropriated and to be used for any purpose during the years 1913 and 1914.

It clearly appears from the house journal that the legislature in making its appropriations for the biennium of 1915 and 1916 took into consideration the amount of money remaining to the credit of the Albion Normal School from the biennium of 1913 and 1914, and deducted such balance from the estimated needs of the institution for the biennium of 1915 and 1916.

On page 17 of the house journal for January 30, 1915, we find an itemized statement of the budget presented to the legislature, amounting in all to \$110,500. That is the amount it was estimated it would cost for improvements and the running of the institution for the years 1915 and 1916, and it appears there was deducted from that amount the estimated balance in the state treasury on January 1, 1915, \$5,000, and the estimated income to the normal school fund for 1915-16, \$28,000, making a total of \$33,000, which was deducted from the \$110,500, leaving \$77,500, and in place of that amount the legislature reduced it to \$76,200, making an appropriation for that sum (see enrolled bill on file in the office of the Secretary of State), thus clearly indicating that the legislature concluded that said amount of \$33,000 had been sufficiently appropriated so that it might be used in the payment of the expenses, etc., of said institution for the biennium of 1915-16.

From said journal it appears that the legislature had before it the estimated balance remaining in the state treasury to the credit of the Albion Normal School, January 1, 1915, and also the estimated income to that school from its permanent endowment fund for the years 1915 and 1916, and that these two items were deducted from the total estimated needs and the difference was \$77,500. The appropriation actually made by the legislature by said act of 1915, however, was \$76,200 for salaries, general maintenance, supplies and equipment of the Albion Normal School. However, the governor vetoed the following items of said bill:

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For summer school salaries.....\$3,000

For up-keep, repairs, building and ground im-
provements 6,000

For equipment and connecting with transmis-
sion line U. S. government Minidoka
power station..... 2,500

For altering water supply system..... 2,000

thus vetoing \$13,500 of said appropriation, leaving as an ap-
propriation \$62,700. (See Sess. Laws 1915, p. 339.)

The legislature evidently considered that this estimated bal-
ance of \$33,000 would be available for the biennium of 1915
and 1916 and made the appropriation with that intention
or understanding.

The first section of the act making appropriations for the
educational institutions of the state contains, among other
provisions, the following: "The amounts herein specified con-
stitute the whole amount appropriated by the legislature of
the state of Idaho, for the purposes specified, and no greater
sum or sums shall be expended for the said purposes in any
manner which will create a further claim against the state of
Idaho."

It will be observed that the last provision of the first sec-
tion of the appropriation act of 1913 above quoted differs
from the provision of the first section of the appropriation
act of 1915, in that the former provision specifically provides
that the appropriations made by said act "constitute the
whole amount appropriated and to be used for any purposes
during the years 1913 and 1914," while the provision quoted
from the latter act declares that "no greater sum or sums
shall be expended for said purposes in any manner which
will create a further claim against the state of Idaho." The
legislature in enacting that provision evidently had in mind
the above-mentioned two items of \$5,000 and \$28,000, being
the balance in said normal school fund and the accruing in-
terest on the permanent fund for the years 1915 and 1916,
and did not consider that proper claims against that fund
would "create a further claim against the state of Idaho";

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that is, a deficiency claim for which no appropriation had been made.

Taking into consideration all of the acts referred to, it is clear that it was not the intention of the legislature in any manner to interfere with or amend the said act of 1905 making an appropriation of one-half of all the moneys which may accrue to said normal school fund for the support and maintenance of said Albion Normal School, nor was it intended to amend or repeal subd. 66 of sec. 17 of the Rev. Codes of 1909, which expressly continues in force said act of 1905 establishing the normal school fund.

As appears from said house journal, the legislature took into consideration in making the appropriation for said Albion Normal School the two items consisting of the estimated balance in the state treasury on January 1st, 1915, it being \$5,000, and the estimated income to the normal school fund for the years 1915-16, amounting to \$28,000, making a total of \$33,000, and those two items were deducted from the total estimated needs of said institution, and the difference was appropriated directly by the legislature from other revenues of the state.

We therefore conclude that under the laws existing prior to said appropriation bill of 1915, the funds referred to in said two items had been appropriated for the support and maintenance of said normal school and that the balance remaining unexpended during the biennium of 1913-14 may be used for the proper purposes for the biennium of 1915-16.

It is admitted by respective counsel that the question here presented with reference to the Albion Normal School fund also arises with reference to several other institutions of the state having permanent endowment funds; that it has been the practice of such institutions in the past to use those funds remaining over from one biennium for the payment of bills in the succeeding biennium, but the several acts of the legislature referred to in this opinion are in such condition as to fully justify the state auditor, in order to protect himself, in refusing to draw warrants on said funds in the manner

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directed by the state board of education until the question here involved had been judicially determined.

The matter at issue in this proceeding is of such importance as to fully justify both the state auditor and the state board of education in asking the courts to pass upon the proper status of the income from said endowment funds and in having the several acts of the legislature with reference thereto construed by the court.

The peremptory writ will issue. No costs are awarded in the case.

Budge and Morgan, JJ., concur.

(June 19, 1915.)

ROBERT H. LEONARD, Plaintiff, v. JOHN S. ST. CLAIR,
Defendant.

[149 Pac. 1058.]

COUNTY OFFICERS—SALARIES—CONSTITUTIONAL LAW.

1. Sec. 7 of art. 18 of the constitution of Idaho, which provides: "All county officers and deputies when allowed, shall receive, as full compensation for their services, fixed annual salaries, to be paid quarterly out of the county treasury, as other expenses are paid," was adopted and amended in view of and in order to conform to the established plan of county government which contemplates that the board of county commissioners shall have supervisory power over all county matters, and which provides, among other things, for a settlement between the board and the county officers quarterly, to the end that the officers shall be paid such sums; and such sums only, as may be found to be due to them from the county after deducting all sums due to the county from them.

2. The attempted amendments of sec. 2115, Rev. Codes, whereby county officers' salaries are payable monthly instead of quarterly are in contravention of sec. 7 of art. 18 of the constitution of Idaho, and are void.

Argument for Defendant.

Application for writ of mandate. Demurrer sustained. Writ quashed.

N. Eugene Brasie, for Plaintiff.

The question as to whether or not sec. 2115 is repugnant to sec. 8, art. 18 of the constitution has been passed upon indirectly by this court in the case of *Stookey v. Board of Nez Perces County Commrs.*, 6 Ida. 542, (547), 57 Pac. 312, wherein the court says:

" The people having declared by the said constitutional provision [referring to sec. 7, art. 18] that county officers should be paid by salaries and not by fees. . . . "

The opposition between the constitution and the law should be such that the judge forms a clear and strong conviction of their incompatibility with each other. (*Noble v. Bragaw*, 12 Ida. 265, 272, 85 Pac. 903; *Ogden v. Saunders*, 12 Wheat. (U. S.) 216, 270, 6 L. ed. 606; *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. ed. 205.)

"The acts of the legislature are presumed to be valid until it is clearly shown that they violate some constitutional restriction." (*Wright v. Kelley*, 4 Ida. 624, 43 Pac. 565; *Ex parte Boyce*, 27 Nev. 299, 75 Pac. 1, 1 Ann. Cas. 66, 68, 65 L. R. A. 47; *In re Spencer*, 149 Cal. 396, 117 Am. St. 137, 86 Pac. 896, 9 Ann. Cas. 1105, 1106.)

Wm. Healy, for Defendant.

The term "quarterly," used in connection with the provision for the payment of the salaries of county officers, means once in three months or once in a quarter of a year. This is, of course, also its popular meaning. (*In re Schneider*, 11 Or. 288, 8 Pac. 289; 32 Cyc. 1287; *Kirk v. Hartman*, 63 Pa. St. 97-106.)

Legislative enactments and political systems in force at the time of the adoption of the particular provision of the constitution which is being construed will be examined for the purpose of determining what is meant by the constitutional provision under consideration. (Cooley's Const. Limitations,

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p. 100; 8 Cyc. 736; *Rathbone v. Wirth*, 150 N. Y. 459, 45 N. E. 15, 34 L. R. A. 408.)

Long acquiescence in a particular construction of a constitutional provision is usually given weight by the courts, as is also practical contemporaneous construction by legislative enactment. (*Cooley's Const. Limitations*, p. 102; 8 Cyc. 736.)

J. H. Peterson, Attorney General, and T. C. Coffin, Assistant, *Amici Curiae*.

MORGAN, J.—This is a proceeding commenced in this court for the purpose of procuring the issuance of a writ of mandate directing the defendant, who is the auditor of Owyhee county, to issue to the plaintiff, who is the probate judge of said county, a warrant in payment of his official salary for the month ending May 12, 1915, as provided by sec. 2115 of the Rev. Codes, as amended by chap. 70, page 193, Sess. L. of 1911, and as further amended by chap. 48, page 154, Sess. L. of 1913. The defendant demurred to the petition upon the ground that it does not state facts sufficient to entitle the petitioner to the relief demanded, and contends that sec. 2115, Rev. Codes, as amended, is unconstitutional. The section as amended provides:

“The salary of all county officers, as full compensation for their services must be paid monthly from the county treasury upon the warrants of the county auditor. The auditor shall keep a strict account of all salary warrants drawn by him, which accounts shall be verified and transmitted to the board of county commissioners at each regular meeting thereof, and, if found correct by such commissioners, they shall make an order confirming said account as correct and direct the same to be filed among the records of the board.

“No officer or deputy must retain out of any money in his hands belonging to the county any salary; every officer and deputy shall turn over to the county treasurer all fees which may come into his hands from whatever source at the end of the quarter, together with an itemized statement showing what such fees were collected for and the date thereof; and

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it is hereby made the duty of every county officer to collect and turn in to the county treasury at the end of each quarter all fees allowed by law to be collected by such officer.

“All actual and necessary expenses incurred by any county officer or deputy in the performance of his official duty shall be a legal charge against the county, and such officer and deputy shall at the end of each month file with the clerk of the board of county commissioners a sworn statement accompanied by proper vouchers, showing all expenses incurred by him. At each regular meeting, the board of county commissioners shall audit all such expense accounts and shall pay all such proper expense accounts in the sums allowed and ordered paid, from the county treasury upon the warrants of the county auditor.”

The question propounded to the court by this proceeding is: “Do the acts of the legislature which provide for the payment of county officers monthly violate sec. 7 of art. 18 of the constitution wherein it directs that such salaries are to be paid quarterly?”

It is contended by plaintiff that the words “to be paid quarterly” are not intended to definitely fix the times when instalments of the annual salary are to be paid, but are intended to fix a maximum limit of time in which it must be paid; that the provision is for the protection of the officer and not of the county, and that the legislature may provide for the payment of instalments at any time it sees fit so long as the period of time elapsing between payments be not greater than three months. It is contended by the defendant, upon the other hand, that said constitutional provision is to be construed to mean that a county officer shall receive his annual salary in equal instalments, one of which shall be paid every three months; that it is for the protection of the county and not of the officer. It appears to us the provision is for the protection of both the officer and the county; that it was incorporated in the constitution for the purpose of requiring the county to pay its officer an instalment of his annual salary once every three months, not all of it at the end of the year, and for the further purpose of protecting the county in

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accordance with a system of county government which was in force at the time of the adoption of the constitution.

Sec. 7 of art. 18 of the constitution as it was originally adopted was as follows:

“The officers provided by section six (6) of this article shall receive annually as compensation for their services as follows: sheriff, not more than four thousand dollars and not less than one thousand dollars, together with such mileage as may be prescribed by law; clerk of the district court, who is *ex-officio* auditor and recorder, not more than three thousand dollars, and not less than five hundred dollars; probate judge, who is *ex-officio* county superintendent of public instruction, not more than two thousand dollars, and not less than five hundred dollars; county assessor, who is *ex-officio* tax collector, not more than three thousand dollars and not less than five hundred dollars; county treasurer, who is *ex-officio* public administrator, not more than one thousand dollars, and not less than three hundred dollars; coroner, not more than five hundred dollars; county surveyor, not more than one thousand dollars; county commissioners, such *per diem* and mileage as may be prescribed by law; and justices of the peace and constables such fees as may be prescribed by law.”

The legislature in 1897 proposed an amendment, which was adopted at the November, 1898, election, whereby said sec. 7 now reads:

“All county officers and deputies when allowed, shall receive, as full compensation for their services, fixed annual salaries, to be paid quarterly out of the county treasury, as other expenses are paid. All actual and necessary expenses, incurred by any county officer or deputy, in the performance of his official duties, shall be a legal charge against the county, and may be retained by him out of any fees, which may come into his hands. All fees, which may come into his hands from whatever source, over and above his actual and necessary expenses, shall be turned into the county treasury at the end of each quarter. He shall at the end of each quarter file with the clerk of the board of county commissioners, a sworn statement, accompanied by proper vouchers, showing all ex-

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penses incurred and all fees received, which must be audited by the board as other accounts."

At the time of the adoption of the constitution sec. 2120, Rev. Stats. 1887, was in force and it provided:

"The salaries and all compensation of county officers for services rendered the county, must be paid quarterly from the county treasury, upon the warrants of the county auditor and before being paid to such officers or to any other person, must be allowed and audited by the board of commissioners as other claims against the county" And sec. 2158 was as follows: "The compensation herein mentioned and provided for the officers named in this act shall be paid quarterly out of the county treasury upon the auditor's warrant, after the same has been allowed by the board of county commissioners, and such warrant shall be drawn upon the 'Current Expense' or 'County General' fund of the county."

It is clear that the law in force at the time the constitution was adopted provided for the payment of county officers' salaries quarterly and not monthly.

Sec. 1913, Rev. Codes of Idaho, is a re-enactment of sec. 1755 of the Rev. Stats. of 1887, which was in force at the time of the adoption of the constitution, and of the amendment thereof, and provides that the regular meetings of the board of county commissioners must be held quarterly on the second Monday in January, April, July and October of each year.

It was also provided in sec. 1759, Rev. Stats. of 1887, and was re-enacted in sec. 1917, Rev. Codes, as amended by chap. 143, Sess. L. 1913, page 506, that "the boards of commissioners in their respective counties, have jurisdiction and power under such limitations and restrictions as are prescribed by law.

"1. To supervise the official conduct of all county officers and officers of all districts and other subdivisions of the county charged with assessing, collecting, safekeeping, management or disbursement of the public moneys and revenue; see that they faithfully perform their duties; direct prosecution for delinquencies; approve the official bonds of county

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and precinct officers, and when necessary, require them to renew their official bonds, to make reports, and to present their books and accounts for inspection;

“9. To examine and audit the accounts of all officers having the care, management, collection or disbursement of moneys belonging to the county, or appropriated by law, or otherwise, for its use and benefit;

“10. To examine, settle and allow all accounts legally chargeable against the county, and other warrants to be drawn on the county treasurer therefor, and provide for the issuing of the same.”

Sec. 2160, Rev. Stats. 1887, was re-enacted as sec. 2135, Rev. Codes, and it is as follows: “Accounts for county charges of every description must be presented to the board of county commissioners to be audited according to law.” Sec. 2161, Rev. Stats. 1887, is in part as follows: “The following are county charges: 1. Charges incurred against the county by virtue of any provision of this title.” This provision was re-enacted in sec. 2136, Rev. Codes, and the title referred to is title 11, wherein the payment of salaries to county officers is provided for. So it must have been, at the time of the adoption of the constitution, and must still be a part of the plan of county government, that the board shall pass upon and allow, or disallow, claims for salaries of county officers.

The board was prohibited by sec. 1771 of the Rev. Stats. of 1887, which provision has been incorporated in sec. 1945 of the Rev. Codes, from allowing any account or causing or permitting any warrant to be issued to “any county or precinct officer entrusted with the collection, safekeeping or disbursement of public funds who has failed to make any statement or settlement of his accounts, as required by law, or who has failed to account for and pay over the public funds received by him, when, and as required by law, or who is in any way delinquent or a defaulter in his trust, nor to any delinquent taxpayer.”

It appears to us to be perfectly clear that when sec. 7 of art. 18 of the constitution was originally framed and adopted and when it was amended in order to change the compensa-

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tion of county officers from a fee system to a salary system, it was adopted and amended in view of and in order to conform to the established plan of county government which contemplates that the board of county commissioners shall have supervisory power over all county matters, and which provides, among other things, for a settlement between the board and the county officers quarterly, to the end that the officers shall be paid such sums, and such sums only, as may be found to be due to them from the county after deducting all sums due to the county from them.

The language of sec. 7 of art. 18 of the constitution is clear wherein it says: "All county officers and deputies when allowed, shall receive, as full compensation for their services, fixed annual salaries to be paid quarterly out of the county treasury, as other expenses are paid." The word "quarterly" means "quarter yearly; once in a quarter of a year." (32 Cyc. 1287.) The phrase "as other expenses are paid" refers to other expenses of the county, and means that the claim of a county officer for salary shall be passed upon and allowed by the board of county commissioners, which negatives the idea that such a salary may be paid monthly, since the boards of county commissioners, when sec. 7 of art. 18 of the constitution was amended, were required to meet in regular session to pass upon claims against the county, and are still required to meet for that purpose, but quarterly.

It is earnestly urged that the people of Idaho are upon a different business basis now than they were when the constitution was adopted and amended as hereinbefore set forth; that while some years ago business in this state was conducted upon terms of extended credit, now it is upon a cash basis, or current bills are paid from month to month, and that payment of county officers quarterly instead of monthly will result in great inconvenience. We are fully aware of the soundness of this contention and of the regrettable inconvenience which will follow upon our construction of this section of the constitution, but we are not unmindful that if the constitution is to be amended, it must be done by the joint

Argument for Appellant.

act of the legislature and the people themselves, and that it cannot be accomplished by judicial construction.

The attempted amendments of sec. 2115, Rev. Codes, providing for the payment of the salaries of county officers monthly are in contravention of sec. 7 of art. 18 of the constitution of Idaho and are void.

The demurrer to the petition is sustained and the writ quashed. Costs are awarded to the defendant.

Sullivan, C. J., and Budge, J., concur.

(June 19, 1915.)

HENRY E. HOWES et al., Respondents, v. LOUIS DOLS,
Appellant.

[150 Pac. 38.]

NEW TRIAL—NOTICE OF INTENTION TO MOVE FOR—TIME TO FILE—MOTION TO STRIKE.

1. Where a decision is made in open court in the presence of counsel and at the request of counsel the time is extended to file his motion for a new trial, such order does not extend the time for filing the notice of intention to move for a new trial.

2. *Held*, under the facts of this case that counsel for appellant had actual notice of the decision and that the court did not extend the time for filing the notice of intention to move for a new trial.

3. *Held*, that the court did not err in granting the motion to strike the notice of intention to move for a new trial from the files, and denying the motion for a new trial.

APPEAL from the District Court of the First Judicial District for Shoshone County. Hon. W. W. Woods, Judge.

Action in ejectment to recover possession of certain real estate. Judgment for the plaintiffs. *Affirmed*.

J. H. Wixom and Chas. E. Miller, for Appellant.

The court by the order of Nov. 10, 1915, in legal effect, extended the time in which to take the necessary proceedings

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to secure a new trial. (*Kelley v. Clark*, 21 Ida. 231, 121 Pac. 95.)

The Idaho statute is taken bodily from the statutes of California. (Sec. 1054, Cal. C. C. P.; *Burton v. Todd*, 68 Cal. 485, 9 Pac. 663.)

A similar construction was given a like statute by the Washington supreme court. (*Bailey v. Drake*, 12 Wash. 99, 40 Pac. 631.)

The decision of a case consists of the findings of fact and conclusions of law which must be in writing and filed with the clerk. (*Stewart Min. Co. v. Ontario Min. Co.*, 23 Ida. 724, 736, 132 Pac. 787; *Hamilton v. Spokane etc. R. Co.*, 3 Ida. 164, 28 Pac. 408; *Caldwell v. Wells*, 16 Ida. 459, 463, 101 Pac. 812.)

"The party intending to move has a right to wait for a notice in writing (sec. 1010, Cal. C. C. P.), of the decision from the adverse party before giving notice of intention to move for a new trial, and he is entitled to such notice of decision before he is called on to act, although he is present in court when the decision is rendered and waives findings and asks for a stay of proceedings on the judgment." (*Biagi v. Howes*, 66 Cal. 469, 6 Pac. 100; *Roussin v. Stewart*, 33 Cal. 210; *Sawyer v. San Francisco*, 50 Cal. 375; *Fry v. Bennett*, 16 How. Pr. (N. Y.) 402; *Mallory v. See*, 129 Cal. 356, 61 Pac. 1123; *Hughes Mfg. etc. Co. v. Elliott*, 167 Cal. 494, 140 Pac. 17.)

J. E. Gyde and Featherstone & Fox, for Respondents.

Where the trial court ordered a stay of execution on the judgment for a period of twenty days from the date for the purpose of allowing the defendants to move for a new trial, this order did not extend the time to file notice of intention to move for a new trial. (*Stevens v. Northwestern Stage Co.*, 1 Ida. 604.)

Notice of the decision need not be in writing. The word "notice" as used in our statute is synonymous with, and the equivalent of, knowledge, information, intelligence. (*Little*

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v. Schul, 118 Md. 454, 84 Atl. 649; *Jackson County ex rel. Farley v. Schmid*, 141 Mo. App. 229, 124 S. W. 1074; 29 Cyc. 116.)

SULLIVAN, C. J.—This is an appeal from an order made after judgment striking from the files of the court the defendant's "notice of intention to move for a new trial." The action is one in ejectment to recover a certain piece of real estate in the city of Wallace. Judgment was rendered in favor of the plaintiffs, quieting the title to the real estate involved in the plaintiffs.

The decision was rendered in open court on the 10th of November, 1914, and the same was entered in the minutes of the court. The appellant's attorney was present in court when the decision was rendered and at that time requested the court to allow, and the court did then allow him thirty days in which to make and file his motion for a new trial. On the same day, to wit, November 10, 1914, the court made its finding of facts and conclusions of law and on the following day counsel for plaintiffs served on the attorneys for the defendant a cost bill in said action. On the next day, November 12th, the finding of facts, conclusions of law, judgment and cost bill were filed. On the 5th of December following the notice of intention to move for a new trial was served upon one of the attorneys for the plaintiffs. On January 22, 1915, counsel for plaintiffs filed their motion to strike said notice of intention to move for a new trial from the files, and on the same day the motion came on for hearing and was granted and the notice of intention was stricken from the files.

Counsel assigns three errors. The first is that the court erred in not holding and deciding that the statutory ten days for giving notice of intention to move for a new trial would begin to run only from the time appellant or his counsel were served with notice of the making and filing of said decision or that the latter had actual notice of the same; 2d, that the court erred in sustaining and granting respondents' motion to strike appellant's notice of intention to move for a new

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trial from the files; 3d, the court erred in rendering judgment dismissing appellant's motion for a new trial.

The record contains the following order made by the court on the 10th of November, 1914, the day when the finding of facts and conclusions of law were signed by the court:

"In this action, and after the trial thereof, the court having rendered an oral opinion therein, in favor of the plaintiffs, as prayed in their amended complaint, including a judgment for the use and occupation of the premises described therein at the rate of \$7.50 per month, and costs of said action, on motion of Chas. E. Miller, attorney for defendant;

"It is ordered and adjudged that the defendant take and have 30 days from and after this date in which to make and file his motion for a new trial and to file his statement of facts or bill of exceptions, or either, on said motion, and that during the said period all proceedings in said action be stayed, except the making and filing of findings of fact and conclusions of law and the rendering and entering of the final judgment of the court."

However, the findings and judgment were not filed until November 12, 1914.

It is evident from said order that the attorney for the appellants was present in court and had notice of the judgment and decision of the court, since he asked for and was granted thirty days from and after the date of said oral decision in which to file his motion for a new trial, and the trial court clearly understood that said extension was not given for the purpose of filing the notice of motion for a new trial since in the order of the court dismissing defendant's motion for a new trial, made on January 22, 1915, it is stated that the decision in said case was rendered on November 10, 1914, and that the defendant's attorney was present in court when said decision was made and entered and had notice thereof on November 10th; that said notice of intention to move for a new trial was not filed and served until the 5th day of December, 1914; that more than ten days had elapsed since the rendition of said decision by said court and since the filing of

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the finding of facts, conclusion of law and judgment; and that there was no order of the court or judge thereof extending the time for filing the notice of intention to move for a new trial. The court thereupon granted the motion of plaintiffs to the effect that the notice of intention to move for a new trial be set aside and stricken from the files.

Thus the trial court finds that appellant actually did have notice of the decision and that he did not file his notice of intention to move for a new trial until more than ten days had elapsed after he had such notice. While the record shows that the trial court extended the time for serving and filing the motion for a new trial, it does not show that the court extended the time for making and filing the notice of intention to move for a new trial, and the trial court evidently did not intend to extend the time for giving the notice of intention, but simply granted an extension of time for filing the motion for a new trial, thus drawing a distinction between the notice of intention and the motion itself.

Said order of the court and the judgment of dismissal must therefore be sustained, and it is so ordered, with costs in favor of the respondents.

Budge and Morgan, JJ., concur.

(June 22, 1915.)

CARLTON FOX, Prosecuting Attorney for Shoshone County, ex rel. STATE, Plaintiff, v. JOHN M. FLYNN, Presiding Judge First Judicial District for Shoshone County, Defendant.

[150 Pac. 44.]

DISTRICT COURTS—JURISDICTION IN MISDEMEANOR CASES—CONCURRENT WITH PROBATE AND JUSTICES' COURTS—METHODS OF PROCEDURE ADOPTED, SEC. 3925, REV. CODES.

1. Sec. 20, art. 5, of the constitution, provides: "The district court shall have original jurisdiction in all cases, both at law and

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in equity, and such appellate jurisdiction as may be conferred by law."

2. Sec. 13, art. 5, of the constitution, provides: "The legislature shall have no power to deprive the judicial department of any power or jurisdiction which rightly pertains to it as a co-ordinate department of the government; but the legislature shall provide a proper system of appeals, and regulate by law, when necessary, the methods of proceeding in the exercise of their powers of all the courts below the supreme court, so far as the same may be done without conflict with this constitution." The above provision of the constitution is a restriction upon the power of the legislature to limit the jurisdiction conferred by the constitution on the judicial department of the state. The legislature has no power to prescribe a jurisdiction for the district courts of the state less broad than contained in sec. 20, art. 5, of the constitution.

3. It is the settled law of this state, under sec. 20, art. 5, and the decisions of this court, construing said section of the constitution, that district courts have original jurisdiction in all misdemeanor cases, including such misdemeanors as are cognizable in the first instance by probate and justices' courts.

4. Sec. 22, art. 5, of the constitution, provides in part: "Justices of the peace shall have such jurisdiction as may be conferred by law, but they shall not have jurisdiction of any cause wherein the value of property or the amount in controversy exceeds the sum of three hundred dollars, exclusive of interest, nor where the boundaries or title to any real property shall be called in question."

5. Sec. 8, art. 1, of the constitution, provides that "No person shall be held to answer for any felony or criminal offense of any grade, unless on presentment or indictment of a grand jury or on information of the public prosecutor, after a commitment by a magistrate, except in cases of impeachment, in cases cognizable by probate courts or by justices of the peace, and in cases arising in the militia when in actual service in time of war or public danger."

6. Sec. 20, art. 5, enlarged the jurisdiction of the district courts so as to include cases cognizable by the inferior courts in addition to cases which, prior to the adoption of the constitution, were prosecuted by indictment only.

7. Sec. 8, art. 1, of the constitution, places a limitation upon the power of the legislature to confer criminal jurisdiction on probate and justices' courts. (*Case of State v. Raaf*, 16 Ida. 411, 101 Pac. 747, cited and modified.)

8. In construing sec. 8, art. 1, in the light of the system of courts existing prior to, and at the time of, the adoption of our constitution, it was obviously intended to limit the jurisdiction of the probate and justices' courts in criminal and civil cases, giving

Argument for Plaintiff.

to them jurisdiction over such misdemeanor cases as were triable in such courts under the statutes of the territory as they existed prior to the adoption of the constitution. It was also intended to provide that probate judges and justices of the peace act as committing magistrates, before whom any person charged with a felony may have, or waive, a preliminary examination.

9. When jurisdiction was conferred upon the district courts by the constitution in all cases, both at law and in equity, there was conferred, as an incident to such grant, the power to make the same effective by any suitable process or mode of procedure, and district courts may avail themselves of the method of procedure prescribed by the statutes for inferior courts, or as provided by sec. 3925, Rev. Codes.

10. Where a district court, in a proper case, assumes jurisdiction of a misdemeanor, cognizable before a probate or justices' court, and files a complaint and issues a warrant, it is the duty of said court to proceed with the trial of the cause; and a writ of mandate will issue from this court compelling such court to so proceed.

Original application for writ of mandate directing Hon. John M. Flynn, presiding judge of the first district in and for Shoshone county, to assume original jurisdiction and proceed with the trial of a certain misdemeanor cognizable in probate and justices' courts. *Writ granted.*

J. H. Peterson, Atty. Genl., and E. G. Davis and T. C. Coffin, Assistants, for Plaintiff.

A misdemeanor is a case at law, and therefore within the original jurisdiction of the district. (*Toncray v. Budge*, 14 Ida. 621, 635, 95 Pac. 26; *State v. Raaf*, 16 Ida. 411, 414, 101 Pac. 747; *State v. West*, 20 Ida. 387, 118 Pac. 773.)

When one or more courts may take cognizance of the same case in the first instance, they are said to have concurrent original jurisdiction. (*Hercules Iron Works v. Elgin etc. Ry. Co.*, 141 Ill. 491, 30 N. E. 1050; Bouvier's Law Dictionary.)

When a court has been granted a certain jurisdiction by the constitution, all the means necessary to the exercise of that jurisdiction are included within the grant. (*McDougall v. Sheridan*, 23 Ida. 191, 224, 128 Pac. 954.)

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Walter H. Hanson and James A. Wayne, for Defendant.

It was the apparent understanding of those participating in the constitutional convention that misdemeanors would be best handled by courts of inferior jurisdiction and not of record. (Proceedings Idaho Const. Convention, pp. 272-278.)

Prior to the adoption of the constitution, the only method of prosecuting a misdemeanor in district courts was by an indictment. (*People v. Du Rell*, 1 Ida. 44.)

While felonies may be prosecuted by information, that right does not extend to misdemeanors. (*State v. West*, 20 Ida. 387, 118 Pac. 773; *State v. Braithwaite*, 3 Ida. 119, 27 Pac. 731.)

In any case, no man can be brought before a court except on a warrant of arrest issued by a magistrate, such officer being especially entrusted with the power of issuing that process. (*State v. Raaf*, 16 Ida. 411, 101 Pac. 747.)

The legislature did not make the district judge a magistrate, and therefore he is powerless to issue a warrant.

While it is true that if the legislature has failed to prescribe procedure in criminal prosecutions, the court may do so, this rule does not apply where there is a statutory procedure which may be followed. (*McDougall v. Sheridan*, 23 Ida. 191, 224, 128 Pac. 954; *Gardner v. Superior Court of Los Angeles County*, 19 Cal. App. 548, 126 Pac. 501; *Ex parte Westenberg*, 167 Cal. 309, 139 Pac. 674; *People v. Budd*, 24 Cal. App. 176, 140 Pac. 714.)

BUDGE, J.—This is an original proceeding in this court and arises upon a petition for a writ of mandate directing the presiding judge of the district court of the first judicial district in and for Shoshone county to assume original jurisdiction, and proceed to the trial of a certain case involving a misdemeanor triable in probate and justices' courts.

The facts out of which this case arise may be briefly stated as follows:

The prosecuting attorney of Shoshone county subscribed and swore to a criminal complaint before the Honorable

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William W. Woods, judge of the first judicial district, charging L. E. Sweet, W. A. Simons, the Sweet Hotel Company, a corporation, and L. E. Sweet and W. A. Simons, managers of said hotel company, a corporation, with the crime of permitting gambling in the city of Wallace, Shoshone county, Idaho. In that case the defendants filed a motion for a change of judge, and also a motion to quash and dismiss the action, which had been begun as aforesaid. The motion for a change of judge was granted, and Judge John M. Flynn, one of the judges of the eighth judicial district, and the defendant in this action, was called to hear the case upon the motion to quash and dismiss. After hearing said motion, the said Judge Flynn, on December 9, 1914, made an order granting the motion of the defendants to quash and dismiss the action, "upon the grounds and for the reasons that prior to the filing of the criminal complaint herein no presentment or indictment had been found by a grand jury charging the defendants with the crime set forth in said criminal complaint; that no complaint or information or allegation in writing has ever been made to a magistrate charging the defendants herein with the commission of the crime set forth in said criminal complaint, and that the district judge is not a magistrate within the provisions of the statutes of this state and had no jurisdiction to issue a warrant of arrest upon said criminal complaint; and upon the further ground that a criminal prosecution in the district court cannot be instituted by the filing of a criminal complaint in this court and the issuance of a warrant of arrest thereon."

There are two questions involved in this case: First, Have district courts original jurisdiction to hear and determine misdemeanor cases cognizable in probate and justices' courts; and upon a proper showing, is it their duty to hear and determine such cases in the first instance? Second, If district courts have original jurisdiction in misdemeanor cases cognizable in the probate and justices' courts, what methods or procedure must be followed in the exercise of such jurisdiction? We will discuss these questions in the order above given.

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Sec. 20, art. 5, of the constitution, provides as follows:

“The district court shall have original jurisdiction in all cases, both at law and in equity, and such appellate jurisdiction as may be conferred by law.”

In the case of *State v. Raaf*, 16 Ida. 411, 101 Pac. 747, this court held that, under the above section of the constitution, district courts have original jurisdiction in all misdemeanor cases, as well as in cases of felony. This court held to the same general effect in *State v. McGreevey*, 17 Ida. 453, 105 Pac. 1047. In the case of *State v. West*, 20 Ida. 387, 118 Pac. 773, in referring to the case of *State v. Raaf*, *supra*, this court used the following language:

“This court concluded, and so held, that justices’ courts and the district court have concurrent jurisdiction in misdemeanor cases which come within the justices’ jurisdiction, and that in such cases a justice of the peace has no authority or jurisdiction to hold a preliminary examination and commit the party to the district court.” And the court further held that, where two or more courts have concurrent jurisdiction, the court which first obtains jurisdiction must retain it to a final determination of the cause.

Sec. 13, art. 5, of the constitution is as follows:

“The legislature shall have no power to deprive the judicial department of any power or jurisdiction which rightly pertains to it as a co-ordinate department of the government; but the legislature shall provide a proper system of appeals, and regulate by law, when necessary, the methods of proceeding in the exercise of their powers of all the courts below the supreme court, so far as the same may be done without conflict with this constitution.”

The above provision of the constitution is a restriction upon the power of the legislature to limit the jurisdiction conferred by the constitution on the judicial department of the state. While the legislature may provide a proper system of appeals and regulate, by law, when necessary, the methods of proceeding in the exercise of the powers of all the courts below the supreme court, in doing so, it has no power to prescribe a jurisdiction for the district courts of the state, which

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is less broad than contained in section 20, article 5, of the constitution.)

We think it to be the settled law of this state, under sec. 20, art. 5, *supra*, and the decisions of this court above cited, construing said section of the constitution, that district courts have original jurisdiction in all misdemeanor cases, including such misdemeanors as are cognizable in the first instance by probate or justices' courts.

This, then, brings us to a discussion of the second question. Probate courts are, by section 21, article 5, of the constitution, given concurrent jurisdiction with justices of the peace in all criminal cases. Sec. 22, art. 5, of the constitution provides in part as follows:

"Justices of the peace shall have such jurisdiction as may be conferred by law, but they shall not have jurisdiction of any cause wherein the value of property or the amount in controversy exceeds the sum of three hundred dollars, exclusive of interest, nor where the boundaries or title to any real property shall be called in question."

In discussing this section of the constitution in the Raaf case, this court used the following language:

"It will at once be noticed that the constitution does not undertake to in any manner fix or prescribe the jurisdiction of justices' courts in criminal cases, but leaves that entirely to the legislature; nor does it place any limitation upon the power of the legislature in conferring criminal jurisdiction on justices of the peace."

This statement of the court, when considered in connection with sec. 8, art. 1, of the constitution, is, in our opinion, too broad. Said section provides: "No person shall be held to answer for any felony or criminal offense of any grade, unless on presentment or indictment of a grand jury or on information of the public prosecutor, after a commitment by a magistrate, except in cases of impeachment, in cases cognizable by probate courts or by justices of the peace, and in cases arising in the militia when in actual service in time of war or public danger." Prior to the adoption of the constitution, our system of courts in the territory of Idaho was

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practically the same as it is now in the state; and the jurisdiction of the district courts was limited in criminal cases to the trial of indictments. (Sec. 7600, Rev. Stat. 1887.) The provisions of sec. 8, art. 1, of the constitution, afforded the basis for adding to the procedure of the district court the method, now in vogue, of prosecuting on information of the public prosecutor, and sec. 20, art. 5, enlarged the jurisdiction of the district courts, so as to include cases cognizable by inferior courts, in addition to cases which, prior to the adoption of the constitution, were prosecuted by indictment only. We are of the opinion that sec. 8, art. 1, of the constitution, places a limitation upon the power of the legislature in conferring criminal jurisdiction on probate courts, or on justices of the peace, and to that extent, we think the decision in the case of *State v. Raaf*, *supra*, should be modified. From an investigation of the proceedings had in the constitutional convention, it is clear to our minds that it was never intended by the framers of the constitution to confer upon the legislature the power to invest probate and justices' courts with unlimited criminal jurisdiction, and when sec. 22, art. 5, of the constitution was adopted, it was not intended to confer upon justices of the peace and probate courts jurisdiction in felony cases. When this provision of the constitution is considered in the light of the system of courts existing prior to, and at, the time of the adoption of our constitution, it cannot be construed to invest the legislature with power to confer on probate and justices' courts jurisdiction in felony cases. It was obviously intended to limit the jurisdiction of the probate and justices' courts both in criminal and civil matters, giving to them jurisdiction only over such misdemeanors as were triable in such courts under the statutes as they existed prior to the adoption of the constitution; also to provide that probate judges and justices of the peace act as committing magistrates, before whom any person charged with a felony may have, or waive, a preliminary examination, and to invest these courts with authority to bind such persons over to await the action of the district court or the grand jury. Sec. 8, art. 1, which pro-

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vides that "No person shall be held to answer for any felony or criminal offense of any grade, unless on presentment or indictment of a grand jury or on information of the public prosecutor, after a commitment by a magistrate," prohibits the legislature from conferring, by law, upon probate or justices' courts, jurisdiction in any case where a person is held to answer for any felony or criminal offense, and that such person can be held to answer only on presentment or indictment of a grand jury, or on information of the public prosecutor, after commitment by a magistrate; and that the authority of probate judges and justices of the peace, in conducting preliminary examinations as provided by the statutes of this state, is limited by sec. 8, art. 1, to the duties of magistrates. They have original jurisdiction only in such misdemeanor cases as are by statute made capable of being tried in their courts; and are limited in the jurisdiction, which may be conferred upon them by the legislature, to such cases as were cognizable by such courts at the time the constitution was adopted.

It is conceded by counsel for respondent that the jurisdiction of district courts was enlarged under sec. 20, art. 5, of the constitution, but contended that the legislature has failed to prescribe a method of procedure, and consequently, district courts have no authority to entertain cases over which they have original or concurrent jurisdiction with probate and justices' courts.

It would seem that, when jurisdiction is conferred upon the district court by the constitution in all cases, both at law and in equity, there is also conferred, as an incident of such grant, the power to make the same effective by any suitable process or mode of procedure which may be adopted, and that the district court could avail itself of the method of procedure prescribed by the statutes for the inferior courts, or as provided by sec. 3925, Rev. Codes, viz., "When jurisdiction is, by this code or by any other statute, conferred on a court or judicial officer all the means necessary to carry it into effect are also given; and in the exercise of the jurisdiction if the course of proceedings be not specially pointed

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out by this code, or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code." This section of the statute was followed by this court in the case of *McDougall v. Sheridan*, 23 Ida. 191, 128 Pac. 954.

It is not for us to speculate upon the wisdom of the provisions of the constitution which thus extend the jurisdiction of our district courts. Clearly it was not intended that, in general, the class of cases cognizable by the inferior courts should be originally tried in the district courts. Over the proceedings in the district courts trial judges have control, and only in proper cases, and upon a proper showing made, should the district courts assume original jurisdiction in cases cognizable in the probate or justices' courts. Circumstances might arise, in view of local conditions, that would warrant a district court to assume jurisdiction in misdemeanor cases, in order that the laws of the state be enforced, and that justice be done to litigants. Trial courts, under our system, are in a position to advise county attorneys as to the expediency of prosecuting, in the first instance, misdemeanor cases in the district courts; but where a sufficient showing is made that justice cannot be procured by a trial in the inferior courts, under the constitutional provision above cited, district courts have original jurisdiction to try and determine all cases, both at law and in equity, and are clothed with authority to adopt the procedure prescribed for the trial of misdemeanor cases in the inferior courts, or such mode of procedure as may appear most conformable to the spirit of the code.

Where a district court assumes jurisdiction by filing a complaint and issuing a warrant in misdemeanor cases, it is the duty of such court to proceed with the trial of the cause, and a writ of mandate will issue from this court requiring such district court to so proceed.

It is therefore ordered that a writ of mandate issue directed to the presiding judge of the first judicial district, to proceed with the trial of the above-entitled cause.

Sullivan, C. J., and Morgan, J., concur.

Argument for Defendant.

(June 23, 1915.)

In Re Application of WILLIAM HOWELL, for Writ of Habeas Corpus.

[150 Pac. 19.]

COUNTY COMMISSIONER—AWARDING CONTRACTS—INSUFFICIENCY OF INDICTMENT TO CONSTITUTE PUBLIC OFFENSE—STATUTORY CONSTRUCTION.

1. An indictment which fails to allege that a county commissioner was interested directly or indirectly in a contract awarded by the board of county commissioners of which he was a member, or in the benefits to be derived therefrom, at the time said contract was awarded, is insufficient, and fails to state any fact or facts sufficient to constitute a public offense under the provisions of sec. 88-b, Sess. Laws 1911, p. 169.

2. Held, that the indictment in this case is insufficient, and the demurrer should have been sustained.

Original application in this court by William Howell for a writ of *habeas corpus*. After hearing, the petitioner ordered discharged.

A. A. Fraser, for Petitioner.

The indictment does not state facts sufficient to bring the petitioner within the provisions of the statute. (*People ex rel. Gaffney v. Mayer*, 41 Misc. 368, 84 N. Y. Supp. 817; *O'Neill v. Town of Auburn*, 75 Wash. 207, 135 Pac. 1000, 50 L. R. A., N. S., 1140; *Escondido Lumber etc. Co. v. Baldwin*, 2 Cal. App. 606, 84 Pac. 284; *Contra Costa County v. Soto*, 138 Cal. 57, 70 Pac. 1019; *State v. Feagans*, 148 Ind. 621, 48 N. E. 225.)

R. L. Givens, Pros. Atty., E. P. Barnes and J. M. Parish, Assts., for Defendant.

Such statutes have been held of the greatest importance by reason of the effect upon the interests of the public. (*Bay v. Davidson*, 133 Iowa, 688, 119 Am. St. 650, 111 N. W. 25, 9 L. R. A., N. S., 1014.)

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It is a well established and salutary rule in equity that he who is entrusted with the business of others cannot be allowed to make such business an object of pecuniary profit to himself. It is a general proposition that a public officer must not be interested in a contract. (Dillon on Municipal Corporations, sec. 444; McQuillan, Mun. Corp., sec. 550, and cases cited; *Doll v. State*, 45 Ohio St. 445, 15 N. E. 293.)

The case of *State v. York*, 131 Iowa, 635, 109 N. W. 122, was under a statute similar to our own, and the sufficiency of the indictment was sustained. (See, also, *State v. Shea*, 106 Iowa, 735, 72 N. W. 300; *Nelson v. Harrison County*, 126 Iowa, 436, 102 N. W. 197; *Cheney v. Unroe*, 166 Ind. 550, 117 Am. St. 391, 77 N. E. 1041; *Noble v. Davison*, 177 Ind. 19, 96 N. E. 325; *City of Minneapolis v. Canterbury*, 122 Minn. 301, Ann. Cas. 1914D, 804, 142 N. W. 812; *Robinson v. Huffaker*, 23 Ida. 173, 129 Pac. 334; *Anderson v. Lewis*, 6 Ida. 51, 52 Pac. 163; *Independent School Dist. No. 5 v. Collins*, 15 Ida. 535, 128 Am. St. 76, 98 Pac. 857.)

The prohibition against this kind of contracts is further strengthened by secs. 257 and 1956, Rev. Codes. (*Miller v. Smith*, 7 Ida. 204, at 213, 61 Pac. 824.)

BUDGE, J.—The petitioner, William Howell, county commissioner of the first commissioners' district, of Ada county was, on January 12, 1915, indicted by the grand jury of Ada county, which indictment, eliminating the formal parts and descriptive matter which are immaterial so far as the questions involved in this proceeding are concerned, charges the petitioner substantially as follows:

That the said William Howell, on or about the 2d day of May, 1914, and before the finding of this indictment at Boise, in the county of Ada, being then and there a duly elected, qualified and acting officer of Ada county, to wit, a county commissioner for the first district in said county, and as such member of the board of county commissioners did, wilfully, unlawfully, fraudulently and corruptly, become indirectly interested financially in a certain contract dated April 14, 1914, made by and between the board of county

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commissioners of Ada county, in behalf of said county, and one J. J. Carroll, for the improvement of certain public roads.

To this indictment the defendant demurred upon the ground that "said indictment does not state any fact or facts sufficient to constitute a public offense or any offense known to the laws of the state of Idaho," which demurrer was argued and submitted to the trial judge and overruled. Thereafter the defendant entered his plea of not guilty and subsequently petitioned this court for a writ of *habeas corpus*, to which petition due return was made.

This indictment is based upon section 887-b, of the Sess. Laws of 1911, p. 169, which reads, as follows:

"No county commissioner shall in any manner be interested directly or indirectly, in any contract awarded or to be awarded by the board of commissioners or in the benefits to be derived therefrom . . . and for any violation of this provision, such commissioner shall be deemed guilty of a misdemeanor, and shall be punished by a fine not exceeding five hundred dollars (\$500), or by imprisonment not to exceed six (6) months or by both such fine and imprisonment."

The question for our determination is: Does the indictment state facts sufficient to bring the petitioner within the provisions of the statute above quoted? From the indictment it appears that the defendant, while acting in conjunction with the other members of the board of county commissioners of Ada county, entered into a contract dated April 14, 1914, on behalf of said county with one J. J. Carroll, for the improvement of certain public roads in said county; that the petitioner Howell was a member of a copartnership existing under the name of Howell and Ostner, and that said copartnership of Howell and Ostner entered into a subcontract with said J. J. Carroll, the original contractor, under the terms of which said subcontractors did certain work upon the public roads of Ada county, and for which work under said subcontract the firm of Howell and Ostner received from Carroll compensation.

The indictment alleges that the petitioner, as a member of the board of county commissioners of Ada county, on or

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about the 2d day of May, 1914, "did, wilfully, unlawfully, fraudulently and corruptly *become* indirectly interested financially in a certain contract dated April 14, 1914, made by and between the board of county commissioners of Ada county, state of Idaho, in behalf of said Ada county, and one J. J. Carroll, for the improvement of certain public roads."

Sec. 887-b, *supra*, provides: "No county commissioner shall in any manner *be interested directly or indirectly*, in any contract *awarded or to be awarded* by the board of commissioners or in the benefits to be derived therefrom."

As we understood, upon the oral argument in this case, it was admitted by the prosecuting attorney that, at the time the contract was entered into between the board of county commissioners on behalf of Ada county and Carroll, the petitioner was not interested, directly or indirectly, in said contract, or in the benefits to be derived therefrom. A conviction of the petitioner is sought upon the ground and for the reason that, after the contract had been entered into, the copartnership, of which petitioner is a member, entered into a subcontract with the original contractor, Carroll, for the construction of a portion of the highway included in his (Carroll's) contract.

The statute does not say, nor can it be construed to say, that no county commissioner shall in any manner *become* interested, directly or indirectly, in the subject matter of any contract awarded or to be awarded by the board of county commissioners. The commissioner must be interested in the contract itself, or the benefits to be derived therefrom, at the time of its execution in order to come within the provisions of section 887-b. If he subsequently becomes interested in the subject matter of the contract as a member of a copartnership, or as a member of a corporation and was in no way interested in the contract, or in the benefits to be derived therefrom, at the time it was awarded, and the execution of said contract was not due to any influence, act or conduct upon his part, he certainly would not be amenable to the penal provisions of said statute. The purpose of the

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statute in question is to prohibit county commissioners from being interested, directly or indirectly, in a contract, or in the benefits to be derived therefrom, at or prior to the time the contract is awarded. Men are penalized for wrongdoing; not for engaging in legitimate business, or seeking and accepting legitimate employment. And as appears upon the face of this indictment, the petitioner was not interested in the contract let to Carroll by the board of county commissioners, or in the benefits to be derived under that contract at the time it was awarded; but the partnership, of which he was a member, subsequently entered into a subcontract and was compensated for the work and labor performed by the original contractor. The partnership had no business dealings with the county. The county was not responsible to the partnership. The original contractor was responsible to the subcontractor and was solvent.

A contractor has the right to enter the field of employment and let subcontracts for the doing of work under his contract, and it was never the intention of the legislature to restrict the citizens of this state from entering into fair and legitimate contracts. And more particularly is this true, when it clearly appears that no possible advantage could be taken of the county in the performance of the work or the compensation to be received therefor; and where it is conceded that the original contractor was responsible and solvent, that the contract has been fulfilled according to its terms and conditions, and that the county suffered no damage thereby.

In the case of *O'Neill v. Town of Auburn*, 75 Wash. 207, 135 Pac. 1000, 50 L. R. A., N. S., 1140, the court, in dealing with facts somewhat similar to those alleged in the indictment in this case, among other things, held: "Where a paving contractor, after the specifications had been changed so as to require a concrete base instead of a rock base, because of the scarcity of rock, . . . purchased cement in the open market from corporations in which the mayor and a councilman were interested, payment therefor being made in the ordinary course of business, and not dependent upon pay-

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ments received by the contractor from the town, the mayor and councilman were not interested in the contract for the paving, so as to render that contract void.”

In the case of *Escondido Lumber, Hay & Grain Co. v. Baldwin*, 2 Cal. App. 606, 84 Pac. 284, the court held: “Where a contract for the construction of a schoolhouse was properly let to a solvent contractor, and was fully completed, the fact that the contractor purchased the lumber required from a corporation in which one of the trustees of the school district was a stockholder, and thereafter assigned the orders drawn for the amount due under the contract through an attorney to such corporation, was not a violation of Pol. Code, sec. 1876, declaring that no school trustee shall be interested in any contract made by the board of which he is a member. . . . The mere fact that the contractor, without previous arrangement or agreement, saw fit to buy of a corporation for which one of the trustees was an agent certain materials used in the construction of the house, would not render the contract void, . . . or . . . subject to merited criticism . . . it is not pretended or claimed that the building was not properly constructed, from which the formal acceptance would be imperative.”

While it is true that these cases cited are not parallel with the case at bar, for the reason that a corporation acts through its board of directors or by its manager, still, we think the principle involved is applicable.

In the case of *Contra Costa County v. Soto*, 138 Cal. 57, 70 Pac. 1019, it is held: “A contract whereby a county, which had become entitled to a certain sum of money out of the state treasury, agreed with one of the defendants (himself not a county officer) to allow him 25 per cent for services in preparing evidence, etc., was not void, though the defendant employed certain county officers to do a part of the work for him.”

In our opinion, the indictment is insufficient in this, that it fails to allege that the petitioner was interested in any manner, directly or indirectly, in the contract or in the benefits to be derived therefrom, at or prior to the time it was

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actually entered into between the board of county commissioners and Carroll; and in order to bring the petitioner within the purview of the statute heretofore quoted, it is incumbent upon the state to allege and prove these facts.

Where the indictment fails to allege that the commissioner was interested, directly or indirectly, in a contract, or in the benefits to be derived therefrom, at or prior to the time it was awarded by the board of commissioners; or if, upon the trial, the proof is insufficient to establish this, section 887-b of the 1911 Sessions Laws is not broad enough to justify this court in holding that such commissioner who, by reason of being a member of a copartnership which subsequently became interested in the subject matter of the awarded contract, should be subject to removal from office and other penalties prescribed in this statute.

Had the legislature intended that no county commissioner should become interested as a subcontractor or otherwise in the subject matter of a contract either individually or as a member of a copartnership or corporation, the statute would have been made sufficiently broad to have included such cases.

We are of the opinion that the demurrer in this case should have been sustained. Having reached the conclusion that the facts alleged in the indictment against the petitioner do not state a public offense and that the petitioner is illegally detained, it follows that the indictment must be quashed and the petitioner discharged from custody, and it is so ordered.

Sullivan, C. J., and Morgan, J., concur.

Argument for Defendants.

(July 1, 1915.)

B. F. OLDEN, Plaintiff, v. MELBA JULE PAXTON and CHARLES P. MCCARTHY, Judge of Third Judicial District in and for Ada County, Defendants.

[150 Pac. 40.]

WRIT OF PROHIBITION—CONDITION NECESSARY TO ISSUANCE OF WRIT.

1. Before a writ of prohibition will lie, two contingencies must arise; first, that the tribunal, corporation, board or person is proceeding without or in excess of its jurisdiction; second, that there is not a plain, speedy and adequate remedy in the ordinary course of law. (Secs. 4994 and 4995, Rev. Codes.)

2. *Held*, under the facts in this case, petitioner has a plain, speedy and adequate remedy in the ordinary course of law, and no pressing necessity appearing to warrant the interposition of the writ of prohibition, it is denied.

Original application for writ of prohibition. Demurrer to petition sustained, *writ denied* and proceeding dismissed.

J. B. Eldridge, for Plaintiff.

The writ will issue whenever the district court is proceeding without or in excess of its jurisdiction. (*Cronan v. District Court*, 15 Ida. 184, 96 Pac. 768; *Clark v. Rossier*, 10 Ida. 348, 78 Pac. 358, 3 Ann. Cas. 231.)

The general demurrer filed by counsel to the petition herein is not sufficient to raise the question of the remedy, but only goes to the sufficiency of the petition itself. The writ should lie in all such cases. (*McLean v. District Court*, 24 Ida. 441, 134 Pac. 536; *Connolly v. Probate Court*, 25 Ida. 35, 136 Pac. 205; *Baker v. Gooding County*, 25 Ida. 506, 138 Pac. 342.)

Wood, Driscoll & Wood, for Defendants.

To entitle a person to a writ of prohibition, not only must the question raised be one of jurisdiction of the inferior tribunal, but there must be total lack of any other plain,

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speedy and adequate remedy in the ordinary course of law. (*State ex rel. Miller v. Superior Court*, 40 Wash. 555, 111 Am. St. 925, 82 Pac. 877, 2 L. R. A., N. S., 395; 32 Cyc. 613-617; *Lindley v. Superior Court*, 141 Cal. 220, 74 Pac. 765; *Pickering v. Justice*, 16 N. M. 37, 113 Pac. 619; *State v. Superior Court*, 73 Wash. 296, 131 Pac. 816; *Rust v. Stewart*, 7 Ida. 558, 64 Pac. 222.)

The writ will not issue where there is a plain, speedy and adequate remedy (*Willman v. District Court*, 4 Ida. 11, 35 Pac. 692; *Bellevue Water Co. v. Stockslager*, 4 Ida. 636, 43 Pac. 568), and appeal to this court is such remedy.

BUDGE, J.—This is an original application in this court for writ of prohibition to restrain Honorable Charles P. McCarthy, district judge of the third judicial district for Ada county, from proceeding further with the trial of a cause wherein Melba Jule Paxton, formerly Melba Jule Parsons, as plaintiff, seeks to recover from the defendant, B. F. Olden and his bondsmen, Idaho Trust & Savings Bank, Limited, the sum of \$3,500, alleged by plaintiff to be the value of certain jewelry which came into the possession of the said Olden while acting as administrator of the estate of Mary Elizabeth Welpley Parsons, deceased, and which, plaintiff alleges, has never been accounted for nor delivered to her under the will as the only heir of said Mary Elizabeth Welpley Parsons, mother by adoption of plaintiff, who died September 12, 1906.

It is alleged in the complaint, among other things, that B. F. Olden was, on October 17, 1906, appointed administrator with the will annexed of the estate of Mary Elizabeth Welpley Parsons; that the said Olden converted all of said property to his own use prior to his discharge as administrator; and that, though plaintiff has frequently demanded the possession of said property from said administrator, these demands have been refused.

After the usual preliminary motions and demurrers, the defendant answered in the trial court and the cause was thereafter called for trial. The plaintiff insisted upon a trial by a jury and over defendant's objection was sustained.

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Motion was then made to dismiss said cause of action upon the ground and for the reason that the court had no jurisdiction to hear the matter and, on denial of said motion, the present proceeding was instituted.

The petitioner sets out in his petition for the writ numerous allegations contained in the complaint of the plaintiff below, which are in contradistinction to the decree of the probate court approving the final account of the administrator of the estate of Mary Elizabeth Welpley Parsons, deceased, the entering of a decree of distribution by said probate court, the final discharge of said administrator, and the release and exoneration of his sureties, which complaint, counsel for petitioner contends, constitutes a collateral attack on the judgment of the probate court.

To the petition for writ of prohibition a demurrer was interposed by counsel for respondent.

We do not deem it necessary to call attention to, or specifically point out in this opinion, the various allegations of the plaintiff's complaint, or the allegations contained in the petition for the writ of prohibition. Petitioner's contention is based upon the ground that the trial court is without jurisdiction as a *court of law*, and he objects to having the judgment of the probate court collaterally attacked and tried out in a court of law before a jury, but admits that this action may be heard and determined by a court of equity.

When a court has any jurisdiction either at law or in equity, a writ of prohibition will not lie. (*Shell v. Cousins*, 77 Va. 328.) For, as held in the case of *Rust v. Stewart*, 7 Ida. 558, 64 Pac. 222, "The writ of prohibition is an extraordinary remedy which issues, not as a matter of right, but in the sound discretion of the court . . . but does not lie when a plain, speedy, and adequate remedy, in the ordinary course of law exists. The peremptory writ of prohibition will not issue to restrain a district court from proceeding in a certain manner in a proceeding before it, where it is apparent that the action of such district court can be reviewed speedily in one of the modes prescribed by law."

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Sec. 4994, Rev. Codes, must be read and construed in connection with sec. 4995. The former provides: "The writ of prohibition is the counterpart of the writ of mandate. It arrests the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person." The latter provides: "It may be issued by any court except probate or justices' courts, to an inferior tribunal, or to a corporation, board, or person, in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law. . . . "

Thus, two contingencies must arise before the writ of prohibition will issue, viz., that the tribunal, corporation, board or person is proceeding without or in excess of the jurisdiction of such tribunal, corporation, board or person; and that there is not a plain, speedy and adequate remedy in the ordinary course of law.

It is claimed by counsel in the case at bar that this is a proper case for the invocation of the extraordinary writ of prohibition, because the court is proceeding without jurisdiction; not because the defendant has no plain, speedy and adequate remedy in the ordinary course of law. In the case of *Lindley v. Superior Court of Siskiyou County*, 141 Cal. 220, 74 Pac. 765, the court held that where a superior court is without jurisdiction, there is a remedy by appeal from any adverse judgment affecting the petitioner, and the fact that the trial will be expensive and troublesome is not a sufficient ground for interfering by prohibition. The establishment of a rule allowing a resort to a writ of prohibition on that ground alone, would involve too serious and too frequent interruptions to the business of the court.

In the case of *State ex rel. Board of Commrs. of King County v. Superior Court*, 73 Wash. 296, 131 Pac. 816, the court held that the extraordinary writ of prohibition would not lie where there was an adequate remedy by appeal, and that the adequacy of the remedy by appeal is the true test in all cases, and not the mere question of jurisdiction or lack of jurisdiction in the court below to render the judgment.

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Also that the adequacy of the remedy by appeal does not depend upon the mere question of delay or expense. In *Willman v. District Court, etc.*, 4 Ida. 11, 35 Pac. 692, this court said: "The adequacy of a remedy is not to be tested by the convenience or inconvenience of the parties to a particular case."

In the case of *Bellevue Water Co. v. Stockslager*, 4 Ida. 636, 43 Pac. 568, this court held: "The writ of prohibition is the counterpart of the writ of mandate and subject to the same conditions. It will not issue where there is an adequate remedy at law."

In the case of *Sherlock v. Mayor & City of Jacksonville*, 17 Fla. 93, the court in its opinion said: "It is a principle of universal application, and one which lies at the very foundation of the law of prohibition, that the jurisdiction is strictly confined to cases where no other remedy exists, and it is always a sufficient reason for withholding the writ that the party aggrieved has another and complete remedy at law. (High on Ex. Rem., sec. 770, and authorities cited.) And the writ will not be allowed to take the place of an appeal. In all cases, therefore, where the party has ample remedy by appeal from the order or judgment of the inferior court, prohibition will not lie, no such pressing necessity appearing in such cases as to warrant the interposition of this extraordinary remedy, and the writ not being one of absolute right, but resting largely in the sound discretion of the court."

"Thus, where the defendant in an action instituted in an inferior court pleads to the jurisdiction of the court and his plea is overruled, no sufficient cause is presented for granting a prohibition, since ample remedy may be had by an appeal from the final judgment in the case."

In the case of *People ex rel. v. District Court of Larimer County*, 11 Colo. 574, 19 Pac. 541, where a district court had overruled an objection to its jurisdiction of the subject matter of an action pending before it, and was about to adjudicate the cause on the merits, it was held that this would not

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authorize a writ of prohibition, as the objection could be examined on appeal or error.

And also in the case of *State v. District Court of Ramsey County*, 26 Minn. 233, 2 N. W. 698, the court said: "Where, in an ordinary action in the district court, it is alleged that the court has not jurisdiction over the person, the proper remedy is to get the decision of the court upon that question, and review such decision upon an appeal from the judgment. If there be an adequate remedy by appeal, prohibition is not the proper remedy."

In *State ex rel. v. Seay*, 23 Mo. App. 623, the court in its opinion says: "To determine, in the first instance, its own jurisdiction, as far as the same rests upon contested facts, is a legitimate exercise of the judicial powers of any tribunal, and though it may err in such determination, its so doing is not a usurpation of judicial authority, but error, for which the proper remedy of the party aggrieved is by appeal. It must be an extraordinary case indeed, and one calling for immediate relief, which will justify an appellate tribunal to try a jurisdiction depending on contested facts, by prohibition.

"It is settled that *mandamus* does not lie, where the party aggrieved has a remedy by appeal. . . . By parity of reasoning prohibition, which is but a negative *mandamus*, should not lie, unless, at least, the case presents features clearly indicative of the fact that the remedy by appeal is wholly inadequate."

It was held by the supreme court of Washington *State ex rel. Townsend Gas etc. Co. v. Superior Court*, 20 Wash. 502, 55 Pac. 933, that an application for the extraordinary writ of *mandamus* or prohibition would not be entertained by that court when it appeared that there was an adequate remedy by appeal, notwithstanding it might also appear that the court was acting without jurisdiction. The same court in *State ex rel. Carrau v. Superior Court*, 30 Wash. 700, 71 Pac. 648, affirmed this doctrine and also the principle that the expense of appeals and the delays and annoyances incident to an appeal do not affect the adequacy of the appeal.

Points Decided.

In view of the congested condition of the calendar of this court, it becomes absolutely necessary, in order to expedite the business of the court, that, in granting writs of prohibition, *mandamus* and review, we adhere strictly to the law governing these writs and, in the exercise of the court's discretion in matters of this kind, we cannot take into consideration the annoyance, expense or delay in determining whether or not these extraordinary writs should issue. The number of applications for the issuance of extraordinary writs is increasing so rapidly that it is apparent to our minds a strict observance of the law, as applied by the greater weight of authority in the issuance of such writs, should be adopted by this court, and such a writ should not issue where the aggrieved party has another adequate remedy.

The demurrer must be sustained and the writ denied. It is so ordered. Costs are awarded to defendants.

Sullivan, C. J., and Morgan, J., concur.

(July 1, 1915.)

JAMES A. MURRAY, Plaintiff, v. PUBLIC UTILITIES COMMISSION, Defendant.

[150 Pac. 47.]

PUBLIC UTILITIES COMMISSION—REVIEW OF PROCEEDINGS OF—FIXING RATES—SCOPE AND BASIS OF AUTHORITY TO—RULE FOR DETERMINING VALUE OF PUBLIC UTILITY PLANT—PROPER AND IMPROPER ITEMS OF VALUE—DEPRECIATION—VALUE OF WATER RIGHT—FRANCHISE—“GOING CONCERN VALUE”—PERSONAL PROPERTY—ENLARGEMENTS AND EXTENSIONS—WHAT COMMISSION MUST FIND TO JUSTIFY ORDER FOR.

1. Under sec. 63 (a) of the public utilities statute (Sess. Laws 1913, p. 286), this court is vested with substantially the same authority in reviewing the proceedings of the Public Utilities Commission as on appeal, and is given ample power to review the orders of the commission and correct any mistakes that may have been made.

Points Decided.

(*Idaho Power etc. Co. v. Blomquist*, 26 Ida. 222, 141 Pac. 1083, cited and approved.)

2. When proceeding under sec. 30 (a) of the public utilities statute (Sess. Laws 1913, p. 268), empowering the Public Utilities Commission to fix rates to be charged by the proprietor of a public utility, before lowering an existing rate the commission must first find that it is unjust or unreasonable. On the other hand, before raising an existing rate the commission must first find that it is insufficient. Upon finding that a certain rate is discriminatory, preferential or in any way violative of law, the commission may change it so as to correct or eliminate the objectionable feature. The rate as fixed must be a fair one to the consumers or patrons of the utility, but it must also be sufficient to assure the proprietor of the utility a fair and safe return on his investment, and to encourage rather than discourage the investment of capital in public utility enterprises in this state.

3. In determining the value of a public utility plant for the purpose of fixing rates, the rule of "cost of reproduction less depreciation" is the correct general rule or principle to be applied. In applying this rule the worth of a new plant of equal capacity, efficiency and durability, with proper discount for defects in the old plant and actual depreciation for use, should be the measure of value, rather than the cost of exact duplication.

4. In making deduction for the item of depreciation in appraising the value of a public utility plant, such deduction should be allowed only for actual, tangible depreciation, and not for theoretical, or "accrued depreciation"; and if it be shown that the plant is in good operating condition, and giving on the whole as effective service as a new plant, the question of depreciation may be disregarded.

5. The actual value of a water right as an item in the worth of a public utility plant should be considered and arrived at by the same rule as applied in the case of any other class of property. The value of such water right should be measured by the fair market value of a similar water right in the same locality, if that can be shown. If no market value can be established, then the opinion of competent witnesses as to the actual value may be considered. The fair present value of the water right is the ultimate fact to be found and considered by the commission and the court.

6. *Held*, that the commission erred in refusing to consider the actual present value of the water right of plaintiff as an element in the value of his plant, except to the extent of \$2,000 which was paid for it by plaintiff to certain Indians who asserted a claim to the water in question.

7. Evidence on behalf of the proprietor of a public utility to the effect that certain expenses have been incurred in building up

Points Decided.

the business may be considered by the commission as one of the elements of value, under the head of "going concern value." The fact that it is a going concern, in successful operation, should be considered in estimating the value of the physical property and assets, but the commission should not attempt to calculate or segregate any specific theoretical value which might attach to the plant or system merely by reason of the fact that it is a going concern.

8. *Held*, that plaintiff has not established his possession of a valid, existing franchise to operate his utility in the city of Pocatello, and that the commission did not err in refusing to consider the matter of the value of the franchise in its decision and order. As to whether the value of a franchise should be considered in fixing value for rate making purposes, *quaere*.

9. *Held*, that if, in constructing a new plant, of equal capacity, efficiency and durability to plaintiff's present plant, it would be reasonably necessary to place or replace mains and hydrant connections at places where paving has been laid, proper allowance should be made therefor, but if such mains and hydrant connections could be located as effectively in other places where paving has not been laid, then no allowance should be made therefor.

10. The personal property of the proprietor of a public utility, such as office furniture, horses, wagons, tools and materials on hand, and the cost of improving ground around a reservoir, are proper items to be considered by the Public Utilities Commission in estimating the value of the plant, if they represent an investment reasonably necessary to the carrying on of the business of the utility and rendering efficient service to the public; otherwise not.

11. In order to justify the Public Utilities Commission in ordering enlargements or extensions of a public utility plant, the commission must be satisfied from the evidence, first, that the existing plant is not reasonably sufficient to render adequate service; second, that the extension or enlargement is within the scope of the original professed undertaking of the proprietor of the utility; third, that after the completion of the enlargement or extensions the proprietor will be assured of a fair return upon his whole legitimate investment; fourth, that the particular enlargements or extensions in question are reasonably necessary to insure reasonably adequate service.

12. *Held*, that in the absence of a showing that the plaintiff in this case has a valid existing franchise to operate his utility in the city of Pocatello, an order by the Public Utilities Commission requiring him to extend and enlarge his plant is not reasonable, and that said commission had no authority to make such order.

Original application in this court for a writ of review of an order of the Public Utilities Commission fixing certain

Argument for Plaintiff.

rates and ordering the extension and enlargement of petitioner's plant. Order reversed.

N. M. Ruick and Hawley & Hawley, for Plaintiff.

In the leading case of *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. ed. 819, the rule was established by the supreme court of the United States that a public utility is entitled to earn a fair return upon the fair value of the property which it employs in the public service.

The trend of the later decisions, as well as the weightier reasoning, is in favor of allowing the item of value as a "going concern" in estimating the value of a plant for rate-making purposes. (*Venner v. Urbana Water Works*, 174 Fed. 348; *Des Moines Water Co. v. City of Des Moines*, 192 Fed. 193; *Pioneer Tel. & Tel. Co. v. Westenhaver*, 29 Okl. 429, 118 Pac. 354, 38 L. R. A., N. S., 1209; *Spring Valley Water Works v. San Francisco*, 192 Fed. 137.)

In the case of *Cedar Rapids Gas Light Co. v. City of Cedar Rapids*, 144 Iowa, 426, 138 Am. St. 299, 120 N. W. 966, 48 L. R. A., N. S., 1025, the supreme court of Iowa held that, where a court, in fixing fair value for rate purposes, has taken "into account the fact that the plant was in successful operation," it has given adequate consideration to the "going concern" factor. Value as a "going concern" is not dependent upon the goodwill of customers. (*Omaha v. Omaha Water Co.*, 218 U. S. 180, 202, 30 Sup. Ct. 615, 54 L. ed. 991, 48 L. R. A., N. S., 1084; *Des Moines Gas Co. v. City of Des Moines*, 199 Fed. 204, 208.)

The Wisconsin Railroad Commission, recognized as one of the ablest administrative commissions in existence, in *Buhl v. Chicago, Mil. & St. Paul Ry. Co.*, 1 W. R. C. R. 324, decided that cost-of-reproduction-less-depreciation used as a basis of valuation "leaves out of account the value of the plant as a going concern, the business it has built up and the business connections it has made," and consistent with this declaration of principles, that commission has consistently held to the inclusion in the valuation of public utilities

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for rate-making purposes of the element of value as a going concern. (*Hill v. Antigo Water Co.*, 3 W. R. C. R. 623.)

Water rights must be included as an element of value in fixing rates. (*San Joaquin & Kings River Canal & Irr. Co. v. Stanislaus Co.*, 233 U. S. 454, 34 Sup. Ct. 652, 58 L. ed. 1041.) *Bothwell v. Consumers' Co.*, 13 Ida. 568, 92 Pac. 533, 24 L. R. A., N. S., 485, in effect decides that if the petitioner herein had no franchise he would have no right to take up new streets or extend his mains. If the petitioner's franchise has been annulled and canceled, all of petitioner's duties and obligations are at an end. (*Public Service Commission v. New York Ry. Co.*, 77 Misc. Rep. 487, 136 N. Y. Supp. 720.)

The right of this court to review the reasonableness of the action of the commission upon all matters was settled in *Idaho Power & Light Co. v. Blomquist*, 26 Ida. 222, 141 Pac. 1083.

If there is a tangible value to a water right which must be taken into consideration in condemnation proceedings, how can such value be eliminated when it comes to considering the entire value of a company for rate-making purposes? It is impossible to conceive that the framers of our state constitution in using the term "public use" would have so used it as to preclude the idea of the party who had acquired a right to such use, not being possessed of a property right with real value attached. (*Home Telephone Co. v. Carthage*, 48 L. R. A., N. S., 1079, note.)

Neither "cost-of-reproduction-new" or "cost-of-reproduction-less-depreciation" should be adopted as the controlling basis for rate purposes. The real question in a matter of this kind is what the fair value for rate purposes would be. (Whitten 1914 Supp., vol. 2, Valuation of Public Service Corporations, 817; *Minnesota Rate Cases (Simpson v. Shepard)*, 230 U. S. 352, 33 Sup. Ct. 729, 57 L. ed. 1511, 48 L. R. A., N. S., 1151.)

Justice Hughes, who decided the Minnesota rate cases, states in substance that the basis of calculation in determining the rate is the fair value of the property used for the con-

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venience of the public, but that the ascertainment of fair value is not controlled by artificial rules and is not a matter of formula, but "must be a reasonable judgment having its basis in a proper consideration of all relevant facts." (*Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. ed. 819; *Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 29 Sup. Ct. 148, 53 L. ed. 371.)

J. H. Peterson, Atty. Genl., E. G. Davis, T. C. Coffin and Herbert Wing, Assts., for the Commission.

Our public utility law particularly emphasizes the rule of reason in the very section which confers upon the commission the authority to direct such extensions as are here in question. It gives the commission the authority to direct such extensions as in its opinion, after a full hearing upon the merits of the case, ought reasonably to be made. Clearly, if a given utility is maintaining adequate facilities for the proper rendition of its service to the public, an order of the commission requiring an extension of such facilities would be unreasonable. We must therefore determine what are adequate facilities. (*St. Louis & S. F. R. Co. v. Reynolds*, 26 Okl. 804, 138 Am. St. 1003, 110 Pac. 668; *Seward v. Denver & R. G. Co.*, 17 N. M. 557, 131 Pac. 980, 46 L. R. A., N. S., 242.)

The constitutionality of such an act as we are now considering does not appear to have been successfully challenged in any of the courts of this country. We deem it sufficient to merely cite the court to a few of the cases in which public utilities, or other similar commissions, have exercised authority similar to the authority to direct extensions in the case at bar, and such exercise of authority has been upheld by the courts. (*Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *State v. Kansas City R. R. Co.*, 32 Fed. 722; *North Carolina Corp. Commission v. Atlantic Coast Line R. Co.*, 139 N. C. 126, 51 S. E. 793; *Missouri O. & G. R. Co. v. State*, 29 Okl. 640, 119 Pac. 117; *Dewey v. Atlantic Coast Line R. R. Co.*, 142 N. C. 392, 55 S. E. 292; *Northern Pac. R. R. Co. v. Dustin*, 142 U. S. 492, 12 Sup. Ct. 283, 35 L. ed. 1092; *Grand Trunk*

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West R. R. Co. v. Railroad Commission of Indiana, 221 U. S. 400, 31 Sup. Ct. 537, 55 L. ed. 786; *Cincinnati etc. R. R. Co. v. Connersville*, 218 U. S. 336, 31 Sup. Ct. 93, 54 L. ed. 1060, 20 Ann. Cas. 1206.)

Budge & Barnard, for City of Pocatello.

"Goodwill" is excluded as an element of value in all valuations where the utility enjoys a monopoly. (*Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 29 Sup. Ct. 192, 53 L. ed. 382, 15 Ann. Cas. 1034, 48 L. R. A., N. S., 1134; Pond on Public Utilities, sec. 474; *Contra Costa Water Co. v. City of Oakland*, 159 Cal. 323, 113 Pac. 668.)

"Going value" should not be considered as distinct from the plant itself, to be appraised at an arbitrary value, as petitioner suggests should be done in this case, but as an inseparable element entering into the entire value of the plant as an operating structure. (*Brunswick & T. Water Dist. v. Maine Water Co.*, 99 Me. 371, 59 Atl. 537, 539; *Spring Valley Waterworks Co. v. San Francisco*, 192 Fed. 137; *National Waterworks Co. v. Kansas City*, 62 Fed. 853, 10 C. C. A. 653, 27 L. R. A. 827; *Cedar Rapids Gas Light Co. v. City of Cedar Rapids*, 144 Iowa, 426, 138 Am. St. 299, 120 N. W. 966, 969, 48 L. R. A., N. S., 1025.)

"The present market value of the plant or its worth as a going concern is the ultimate practical basis for determining the value of the investment upon which to fix a rate which will produce a fair return. The investment is the actual market value of the property which is being used for the public and is useful or necessary at the time to render the service, etc." (Pond on Public Utilities, sec. 484; *Willcox v. Consolidated Gas Co.*, *supra*; *Cedar Rapids Gas Light Co. v. Cedar Rapids*, *supra*.)

Petitioner's appropriation of water being for the purposes of sale, he did not own the water right, but only possessed a right to distribute water, and therefore he was not entitled to have his water right included as an element of value. (*Wilterding v. Green*, 4 Ida. 773, 45 Pac. 134; *San Diego*

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Land & Town Co. v. National City, 74 Fed. 79; *San Joaquin & Kings River Irr. Co. v. Stanislaus County*, 191 Fed. 875.)

The commission did not err in disallowing the item of cost of pavement over mains in working out the valuation on the theory of cost of reproduction. (*Des Moines Gas Co. v. City of Des Moines*, 199 Fed. 204; *Cedar Rapids Gas Light Co. v. Cedar Rapids*, *supra*.)

Unquestionably, cost of reproduction less depreciation is the correct theory of valuation. (*Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 29 Sup. Ct. 148, 53 L. ed. 371; *Contra Costa Water Co. v. City of Oakland*, 159 Cal. 323, 113 Pac. 668, 677.)

John F. MacLane, as *Amicus Curiae*.

If the exercise of the jurisdiction of the commission to require extensions, additions and improvements is limited and conditioned upon a finding (a) that existing facilities are below the standard of minimum, reasonable adequacy for the service required (*Minneapolis, St. P. etc. R. Co. v. Wisconsin R. R. Commission*, 136 Wis. 146, 116 N. W. 905, 17 L. R. A., N. S., 821); (b) that the new facilities, extensions or additions which are ordered are within the limits of the profession of public calling made by the utility, that is, within the franchise obligations or other profession or "holding out" of the utility (*Northern Pacific R. Co. v. North Dakota*, 236 U. S. 585, 35 Sup. Ct. 429); (c) that the rates of the utility are sufficient to yield a reasonable return upon the entire investment, including the present and newly ordered facilities (*Smyth v. Ames*, 169 U. S. 466, 546, 18 Sup. Ct. 418, 42 L. ed. 819); (d) that the new facilities or extensions or service will in itself be compensatory (*Northern Pacific R. Co. v. North Dakota*, *supra*, and *Norfolk & Western R. Co. v. Conley*, 236 U. S. 605, 35 Sup. Ct. 437, then the section may be sustained as constitutional and valid, and the power of the commission in the given case in which such facts are found is lawfully exercised. Unless rates give a fair return upon present reasonable value, the use of the property has been abridged and constitutional rights invaded. (*Willcox v. Consolidated Gas*

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Co., 212 U. S. 19, 41, 29 Sup. Ct. 192, 53 L. ed. 382, 15 Ann. Cas. 1034.)

In determining the constitutionality of a legislative or commission schedule, the present value is the thing entitled to protection, whether higher or lower than original cost, and irrespective of how, or the consideration for which, the property of the utility devoted to the public use was acquired. (*San Diego Land & Town Co. v. National City*, 174 U. S. 739, 755, 19 Sup. Ct. 804, 43 L. ed. 1154; *Mathews v. Board of Corp. Commrs.*, 106 Fed. 7, 9; *Consolidated Gas Co. v. Mayer*, 146 Fed. 150, 156; *Consolidated Gas Co. v. New York*, 157 Fed. 849; *Minnesota Rate Cases (Simpson v. Shepard)*, 230 U. S. 352, 434, 33 Sup. Ct. 729, 57 L. ed. 1511, 48 L. R. A., N. S., 1151; *Cotting v. Kansas City Stockyards Co.*, 183 U. S. 79, 22 Sup. Ct. 30, 46 L. ed. 92; *San Diego Land & Town Co. v. Jasper*, 189 U. S. 439, 442, 22 Sup. Ct. 571, 47 L. ed. 892; *Cumberland Tel. & Tel. Co. v. City of Louisville*, 187 Fed. 637, 642; *Louisville N. R. Co. v. Railroad Comm.*, 196 Fed. 800, 821; *Des Moines Water Co. v. City of Des Moines*, 192 Fed. 193, 196; *Spring Valley Water Works v. City of San Francisco*, 192 Fed. 137, 145; *Spring Valley Water Co. v. City of San Francisco*, 124 Fed. 574, 592; *Richman v. Consolidated Gas Co.*, 114 App. Div. 216, 100 N. Y. Supp. 81.)

The legislature in adopting the present utility law has indicated a broader policy, and one better calculated to promote stability of investment, efficient service and the investment of private capital, than one which merely stops short of constitutional invasion. (*Minneapolis, St. P. etc. R. Co. v. Wisconsin R. R. Commission*, *supra*; *Brunswick & T. Water Dist. v. Maine Water Co.*, 99 Me. 371, 59 Atl. 537; *Louisville & N. R. R. Co. v. Railroad Commission*, 196 Fed. 800; *Pennsylvania R. Co. v. Philadelphia County*, 220 Pa. St. 100, 68 Atl. 676, 15 L. R. A., N. S., 108; *Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 18, 29 Sup. Ct. 148, 53 L. ed. 371; *Idaho Power & Light Co. v. Blomquist*, 26 Ida. 222, 141 Pac. 1083.)

The reproduction cost method of measuring value has frequently had the approval of courts, as well as commissions,

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and is the method which by reason of the many uncertainties and difficulties present in attempted measurement of value by investment cost, or stock and bond issues, more certainly produces accuracy of results than either of the latter methods. (*Louisville & Nashville Ry. Co. v. Railroad Commission*, 196 Fed. 800, 820; *Shepard v. Northern Pacific Ry. Co.*, 184 Fed. 765, 803; *Des Moines Water Co. v. City of Des Moines*, 192 Fed. 193, 197; *Kennebec Water Dist. v. City of Waterville*, 97 Me. 185, 54 Atl. 6, 19; *Buell v. Ry. Co.*, 1 W. R. C. R. 324; Whitten on Public Utilities, sec. 639; *Appleton Water Works Co. v. Railroad Commission* (Iowa), 142 N. W. 476, 484; Foster on Valuation of Public Utilities, p. 14.)

A line should be drawn sharply between actual, existing depreciation, and theoretical depreciation in determining value upon which to allow a rate of return. (Floy on "The Valuation of Public Utility Properties," pp. 168-217.)

Costs, both reproduction and the original, for industries where monopoly conditions obtain, represent the rights of the investors and the obligations of the consumers, and furnish equitable bases upon which to adjust the relations as between these two classes. (*Hill et al. v. Antigo Water Co.*, 3 W. R. C. R. 623; *In re Menominee & Marinette Light & Traction Co.*, 3 W. R. C. R. 778; *State Journal Printing Co. v. Madison Gas & Electric Co.*, 4 W. R. C. R. 501; *City of Milwaukee v. Milwaukee Gas Light Co.*, 12 W. R. C. R. No. U-234.)

"Going value," as well as any other so-called intangible element of value, must be embraced in a valuation for rate-making purposes. (*People ex rel. Kings County Lighting Co. v. Wilcox*, 210 N. Y. 479, 104 N. E. 911, 51 L. R. A., N. S., 1; *Public Service Gas Co. v. Board Public Utility Commrs.*, 84 N. J. L. 463, 87 Atl. 651; *Pioneer Telp. & Telg. Co. v. Westenhaver*, 29 Okl. 429, 118 Pac. 354, 38 L. R. A., N. S., 1209; *Bonbright v. Geary*, 210 Fed. 44, 54, 56; *Spring Valley Water Co. v. City of San Francisco*, 192 Fed. 137, 167; *Missouri etc. R. Co. v. Love*, 177 Fed. 493, 496; *Shepard v. Northern Pacific R. Co.*, 184 Fed. 765, 810; *Des Moines Water Co. v. Des Moines*, 192 Fed. 193, 197; *San Diego Land & Town Co. v. Jasper*, 110 Fed. 702, 714; *Pennsylvania*

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Co. v. Philadelphia County, 220 Pa. St. 100, 68 Atl. 676, 15 L. R. A., N. S., 108; *Milwaukee Elec. R. Co. v. Milwaukee*, 87 Fed. 577, 580, 585; *Monongahela Navigation Co. v. United States*, 148 U. S. 312, 13 Sup. Ct. 622, 37 L. ed. 463; *Underwood Lbr. Co. v. Pelican Boom Co.*, 76 Wis. 76, 84, 45 N. W. 18; *Public Service Gas Co. v. Board of Public Utility Commrs.* (N. J.), 92 Atl. 606.)

The only judicial decision which can be said to be authority for the disallowance of going value in a rate case is *Cedar Rapids Water Company v. City of Cedar Rapids*, 118 Iowa, 234, 91 N. W. 1081, which case on the point in question has been since in effect overruled by *Cedar Rapids Gas Light Co. v. City of Cedar Rapids*, 144 Iowa, 426, 120 N. W. 966-968, 48 L. R. A., N. S., 1025, affirmed in 223 U. S. 655, 32 Sup. Ct. 389, 56 L. ed. 594.

The fallacy of treating "going value" or like elements of value as some vague and shadowy thing, separable and distinct from the property itself, rather than an essential constituent of the operating entity has been frequently referred to by the courts. (*Brunswick & T. Water District v. Maine Water Co.*, 99 Me. 371, 59 Atl. 537, 539; *Spring Valley Water Co. v. City of San Francisco*, 192 Fed. 137, 167; *Appleton Water Works Co. v. Railroad Commission*, *supra*; *Washburn v. Washburn Water Works*, 129 Wis. 73, 108 N. W. 194.)

The constitutional rights of the utility demand that any water rights or privileges, even though they may have cost the company nothing, must be included in a valuation for rate-making purposes. (*San Joaquin etc. Co. v. Stanislaus County*, 233 U. S. 454, 34 Sup. Ct. 652, 58 L. ed. 1041; *Beloit v. Beloit Water etc. Co.*, 7 Wis. R. C. R. 187 (see note, 48 L. R. A., N. S., 1079.)

O. J. Bandelin, Peter Johnson and G. H. Martin, as *Amici Curiae*.

Wherever water has been appropriated and dedicated to the public use, as in this case, the water right acquired by the appropriator becomes as much appurtenant to the public use

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and to the property of the individual user as does the water right in case of irrigation become appurtenant to the land. In other words, the appropriator becomes the trustee for the use and benefit of the public to be served. Undoubtedly, as the commission has held in this case, he is entitled to have included in the valuation of his plant for the purpose of fixing rates the actual expenditures made in the purchase of the water rights or in the development thereof, but he is entitled to nothing more in the form of valuation upon which rates shall be paid. The water appropriated belonged to the public.

If the petitioner may capitalize his priority in this water right and capitalize his right to appropriate and deliver the same to the city and its inhabitants in excess of the actual cost thereof, he may capitalize that which was given him and penalize the beneficiaries for whose use and benefit the water is appropriated, diverted and delivered by imposing upon them a tax because of their generosity. (2 Wyman on Public Service Corp., p. 1104.)

See, also, decisions of the California Railroad Commission in Northern California Power Co. case, decided July 13, 1912, and *San Diego Land & Town Co. v. National City*, 74 Fed. 79; the decision of the *Public Service Commission of Nevada v. Nevada-California Power Co.*, decided January 29, 1914, and *San Joaquin etc. Irr. Co. v. Stanislaus County*, 191 Fed. 875. The Pocatello Water Company has no property right in the water right which can be valued for rate-making purposes.

"The right to the use of any of the public waters which have heretofore been or may hereafter be allotted or beneficially applied shall not be considered as being a property right in itself, but such right shall become the complement of, or one of the appurtenances of, the land or other thing to which, through necessity, said water is being applied. . . . " (Sec. 3240, Rev. Codes.)

A water right cannot lawfully be valued for rate-making purposes in excess of the actual cost thereof. The California courts have held this rule, even under the California law,

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in water rate cases. (*Leavitt v. Lassen Irr. Co.*, 157 Cal. 82, 106 Pac. 404, 29 L. R. A., N. S., 213, at 216; *San Diego Water Co. v. San Diego*, 118 Cal. 556, 62 Am. St. 261, 50 Pac. 633, 38 L. R. A. 460.)

MCCARTHY, District Judge.—The petitioner, James A. Murray, as the Pocatello Water Company, made application in June, 1913, to the Public Utilities Commission of the state of Idaho, for an increase of rates to be charged for water supplied to the city of Pocatello and its inhabitants. Upon the hearing the city of Pocatello was permitted to intervene and appeared to contest the application. Hearings were had before the commission at Pocatello and Boise, and a considerable amount of testimony was taken, which was transcribed for the use of the commission, and the same is now on file in this court.

In addition to the testimony introduced at the hearing, the commission employed an engineer, Mr. A. J. Wiley, to investigate conditions and report. On the order of the commission, Mr. W. H. Miller likewise visited Pocatello and spent some time in going over the books of the company.

Upon the testimony thus obtained, the commission rendered a decision on April 14, 1914, which, with orders accompanying it, was duly entered in order book No. 1 of the commission, at page 78. This decision and order are a part of the record in this court, marked exhibit "E."

The case is heard in this court on writ of review issued upon the petition of James A. Murray.

The order of the Public Utilities Commission, in question, directs the petitioner to begin without unreasonable delay and continue without unreasonable interruption the construction of certain extensions and additions to its system or plant. The portion of the order in question is to be found on pages 80 and 81 of exhibit "E," and reads as follows:

"It is hereby ordered, that the petitioner begin without unreasonable delay, and continue without unreasonable interruption, the construction of a pipe-line from Mink creek, of sufficient size and capacity by which all of the present

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supply of said creek not now diverted by petitioner may be conveyed from said Mink creek to the reservoir or reservoirs of plaintiff's system situated upon the 'bench' above the city of Pocatello so that the same may be completed during the present year of 1914; the said pipe-line to be, 16 in. riveted steel from Mink creek to Gibson Jack creek, and from Gibson Jack creek to petitioner's upper reservoir at a sufficient distance from the present pipe-lines to be independent of them, and to be equipped with effective blowoff valves and automatic air relief valves, and when completed to have an actual measured capacity of not less than 3.25 second-feet from Mink creek to Gibson Jack creek, and an actual measured capacity of not less than 4.50 second-feet from Gibson Jack creek to the upper reservoir."

The order also fixes the rate which is to be charged by petitioner for supplying water to the inhabitants of Pocatello. The portion of the order which fixes the rates is to be found at page 84 of exhibit "E," and reads as follows:

"It is further ordered, that petitioner, within 30 days after the date hereof, file with the commission its Supplement No. 1 to its Schedule of Rates now on file with the commission, designating as P. U. C. I. No. 1, the said supplement to amend Item No. 35 on page 1 of said schedule, so as to read:

" 'House or private residence, 5 rooms or less, \$1.00 per month.

" 'Each additional room, ten cents per month.'

"Immediately upon the filing of said supplement, the said schedule, P. U. C. I. No. 1, and the said supplement, shall become and remain the schedule of rates which the petitioner shall charge and collect for the service therein set forth until further ordered in the premises."

The main specifications of error relied upon by the petitioner are the following:

First, that in determining the value of the plant as a basis for fixing rates the commission erred in failing to include the following elements: "going concern," franchise, water right, paving over mains and hydrant connections, office fur-

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niture, horses, wagons, tools and materials on hand, and cost of improving ground around reservoir:

Second, that the commission erred and exceeded its authority in ordering the extensions and additions to the plant and system of the petitioner.

The section of the so-called public utilities statute (Sess. Laws 1911, p. 268), which confers power upon the commission to fix rates, is as follows:

"Sec. 30. (a) Whenever the commission, after a hearing had upon its own motion or upon complaint, shall find that the rates, fares, tolls, rentals, charges, or classifications, or any of them, demanded, observed, charged or collected by any public utility for any service or product or commodity, or in connection therewith, including the rates or fares for excursions or commutation tickets, or that the rules, regulations, practices or contracts of any of them, affecting such rates, fares, tolls, rentals, charges, or classifications, or any of them, are unjust, unreasonable, discriminatory or preferential, or in anywise in violation of any provision of law, or that such rates, fares, tolls, rentals, charges, or classifications are insufficient, the commission shall determine the just, reasonable or sufficient rates, fares, tolls, rentals, charges, classifications, rules, regulations, practices, or contracts to be thereafter observed and in force and shall fix the same by order as hereinafter provided, and shall, under such rules and regulations as the commission may prescribe, fix the reasonable maximum rates to be charged for water by any public utility coming within the provisions of this act relating to the sale of water."

Under this section, before lowering a rate the commission must find that it is unjust or unreasonable. Before raising a rate, the commission must find that it is insufficient. Upon finding that a rate is discriminatory, preferential, or in anywise in violation of law, the commission may change it so as to correct or eliminate the objectionable feature. In fixing any rate, the commission must make it just, reasonable and sufficient. In doing this the commission must consider impartially the rights of both the patrons or consumers and the

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proprietor of the utility. The rate fixed must be a fair one to the consumers, but it must also be sufficient to assure the proprietor a fair and safe return on his investment, and to encourage rather than discourage investment in public utility enterprises in the state.

The function of this court in reviewing an order of the commission is defined by the act as follows:

“Sec. 63. (a) [Sess. L. 1913, 286.] The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the constitution of the United States or of the state of Idaho and whether the evidence is sufficient to sustain the findings and conclusions of the commission. The findings and conclusions of the commission on questions of fact shall be regarded as *prima facie* just, reasonable and correct. Such questions of fact shall include ultimate facts and the findings and conclusions of the commission on reasonableness and discrimination.”

In speaking of the same matter, in the case of *Idaho Power etc. Co. v. Blomquist*, 26 Ida. 222, at 256, 141 Pac. 1083, this court said: “This court is there given substantially the same authority in reviewing such orders as on appeal. It has the same record before it that the commission had and may determine whether the evidence is sufficient to sustain the findings and conclusions of the commission, and in so doing must weigh the evidence. It may decide whether the orders of the board are unlawful or whether they violate a right of the petitioner under the constitution of the United States or the state of Idaho, and whether the evidence is sufficient to sustain the findings and conclusions of the commission. It will thus be seen that this court is given ample power to review the orders of the commission and to correct any mistakes that may have been made.”

This court is of the opinion that the rule of cost of reproduction less depreciation, adopted by the commission, is the correct general rule or principle to be applied in this class of cases. However, we believe that in ascertaining values in

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this way the worth of a new plant of equal capacity, efficiency and durability, with proper discount for defects in the old, and the actual depreciation for use, should be the measure of value, rather than the cost of exact duplication. So far as the question of depreciation is concerned, we think deduction should be made only for actual, tangible depreciation, and not for theoretical depreciation, sometimes called "accrued depreciation." In other words, if it be demonstrated that the plant is in good operating condition, and giving as good service as a new plant, then the question of depreciation may be entirely disregarded.

So far as the question of value of the plant as a basis for fixing rates is concerned, this court thinks that the most serious question presented is the question as to whether the value of the water right should be considered, and for this reason that question will be considered first. It is admitted in the decision of the commission that the commission refused to place any value upon the water right of the petitioner, or to consider the value of his water right as an element in fixing rates, further than to consider the sum of \$2,000, which the evidence shows was paid by petitioner to certain Indians who asserted a claim to the water in question. This court holds that the action of the commission in refusing to consider the value of the water right as an element, further than the payment of this \$2,000, was error; following the decision of the supreme court of the United States in *San Joaquin & Kings River Canal & Irr. Co. v. Stanislaus County*, 233 U. S. 454, 34 Sup. Ct. 652, 58 L. ed. 1041, rendered on April 27, 1914. It is only fair to the Public Utilities Commission to note that this decision was rendered after the commission decided the present case.

When the provisions of the constitution and statutes of this state relating to water rights are carefully read together, it is apparent that if one appropriates water for a beneficial use, and then sells, rents or distributes it to others who apply it to such beneficial use, he has a valuable right which is entitled to protection as a property right. (Secs. 1, 2 and 3, art. 15, of the Constitution; sec. 3240, Rev. Codes; *Hard v.*

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Boise City Irr. Co., 9 Ida. 589 [76 Pac. 331, 65 L. R. A. 407], especially at pages 599, 600.) This right has been recognized in almost every adjudication of water rights by the courts of this state; the various ditch companies or carriers have often been parties, and their water rights have been recognized. To be sure, the person who takes water from the water company or carrier, also acquires a right to the use of it, dependent upon user and payment, but this does not alter the fact that the water company has a right.

The supreme court of the United States, in *San Joaquin etc. Co. v. Stanislaus County*, *supra*, does not state any rules for ascertaining the value of such a water right. The value to be considered by the commission is the present, fair value of the water right at the time the rate is fixed. The original cost is not at all conclusive, if it can be shown that it now has a different value, although the original cost is, as in all cases, an element which may be considered. The present fair value should be determined by the best evidence of which the nature of the case is susceptible. It should be measured by the fair market value of a similar water right in the locality, or a similar locality, if such can be established by satisfactory evidence. If no market value can be established, then the opinion of competent witnesses as to the actual value may be considered. In this respect the case does not present any exceptional features. The same rule is applied in the case of any property, real or personal. The fair market value is the usual standard; but, if it be shown that the property has no market value, then witnesses may testify to actual value, which is, of course, largely a matter of opinion. Because it is difficult to determine the exact value of a certain kind of property, it does not follow that the owner shall be refused the protection of the law. The fair present value of the water right is the ultimate fact to be found and considered by the commission and the court. Exactly what probative or evidentiary facts shall be considered, or what standard of measurement shall be adopted in finding that ultimate fact, will depend largely upon the facts of each case as it arises. We suggest that the expert engineers employed

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by the commission, as well as those testifying for the parties, may render great assistance to the commission in deciding these questions in each case.

Since we hold that the commission erred in this regard, the order of the commission must be reversed, so far as the fixing of rates is concerned. However, we think it best, for the guidance of the commission and parties, to express our views as to the other specifications of error relied upon by petitioner.

If evidence is offered to show that certain expenses have been incurred in building up the business, then this may be considered by the commission as one of the elements under the head of "going concern value." Further than this, we are of the opinion that the commission should not attempt to calculate or segregate any specific theoretical value which attaches to the plant or system of the petitioner, by reason of the fact that it is a going concern, but that this fact should be considered in estimating the value of the physical property and assets of the petitioner. In other words, the question as to the value of petitioner's property and investment should be treated, and viewed, by witnesses and by the commission, in the light of the fact that the petitioner's plant and system are a going concern; that they are in actual, successful operation.

On the record in this case we are of the opinion that it is not demonstrated that petitioner has a valid, existing franchise (See *City of Pocatello v. Murray*, 206 Fed. 72; *Murray v. City of Pocatello*, 214 Fed. 214), and that the commission was, therefore, correct in refusing to consider the matter of a franchise in its decision and order. It not being necessary to decide, for the purposes of this case, whether the value of a valid, existing franchise should be considered in fixing rates, we express no opinion on that question at this time.

If, in constructing a new plant of equal capacity, efficiency and durability, it would be reasonably necessary to place or replace mains and hydrant connections at places where paving has been laid, then, we are of the opinion that, in accordance

with the general rule of valuation which we have adopted, allowance should be made on that account. If, on the other hand, in providing such a plant, it would not be reasonably necessary to place or replace mains and hydrant connections in places where such paving has been laid, but the mains and hydrant connections could be placed in other places to just as good effect, then, we do not think that such allowance should be made.

So far as the office furniture, horses, wagons, tools, materials on hand and cost of improving ground around reservoir are concerned, we think that all of these items should be considered by the commission, if they represent an investment reasonably necessary to the successful carrying on of the petitioner's business and the rendering of his service to the public; otherwise not.

The section of the act (Sess. Laws 1913, chapter 61), which empowers the commission to order extensions or enlargements of a plant, reads as follows:

"Sec. 34. Whenever the commission, after a hearing had upon its own motion or upon complaint, shall find that additions, extensions, repairs, or improvements to or changes in the existing plant, scales, equipment, apparatus, facilities or other physical property of any public utility or of any two or more public utilities ought reasonably to be made, or that a new structure or structures should be erected, to promote the security or convenience of its employees or the public, or in any other way to secure adequate service or facilities, the commission shall make and serve an order directing such additions, extensions, repairs, improvements or changes be made or such structure or structures be erected in the manner and within the time specified in said order. . . . "

The use of the word "reasonably" is to be noted. Here again, in determining what is reasonable, the rights of both consumer and proprietor must be considered. In this connection the commission and court must bear in mind the provisions of our state constitution, that no person shall be deprived of his property without due process of law, and that

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private property may not be taken for public use until a just compensation shall be paid therefor, as well as the similar provisions in the federal constitution. (Secs. 13 and 14, art. 1, Idaho constitution.) To compel the proprietor of a utility to make enlargements or extensions under such circumstances that he could not make a fair return upon his whole investment, would certainly be depriving him of his property without due process of law. In order to justify the commission in ordering enlargements, the commission should be satisfied from the evidence; first, that the existing plant is not reasonably sufficient to render adequate service (*Washington ex rel. O. R. & N. Co. v. Fairchild*, 224 U. S. 510, 32 Sup. Ct. 535, 56 L. ed. 863); second, that the extension or enlargement is within the scope of the original professed undertaking of the proprietor of the utility (*Northern Pacific R. Co. v. North Dak.*, 236 U. S. 585, 35 Sup. Ct. 429, at 433); third, that after the making of the enlargements or extensions, the owner will be insured a fair return upon his whole investment (*Smyth v. Ames*, 169 U. S. 466-546, 18 Sup. Ct. 418, 42 L. ed. 819); fourth, that the particular enlargements or extensions are reasonably necessary to insure reasonably adequate service (*Northern Pacific R. Co. v. North Dak.*, *supra*, and *Washington ex rel. O. R. & N. Co. v. Fairchild*, *supra*).

As before pointed out, we are of the opinion that it is not demonstrated upon the record in this case that petitioner has any valid, existing franchise from the city of Pocatello. An extension of the system cannot be ordered unless such an order would be reasonable under the circumstances. Under such circumstances we do not think that an order for the extension and enlargement of the plant is reasonable, and therefore hold that the commission had no authority to make such an order.

The order of the Public Utilities Commission is reversed, and the cause remanded with instructions to the commission to entertain further proceedings in accordance with the views herein expressed.

Sullivan, C. J., and Morgan, J., concur.

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(July 7, 1915.)

JOHN THOMAS, Plaintiff, v. THE CITY OF GOODING,
a Municipal Corporation, et al., Defendants.

[149 Pac. 1064.]

PROHIBITION—CITY COUNCIL—CITY BONDS—ISSUANCE OF—PROCEEDINGS
OF COUNCIL—ELECTION—PURCHASE OF CITY HALL—VALIDITY OF
BONDS.

1. *Held*, that the city of Gooding can legally vote bonds for the purpose of purchasing an existing building for a city hall, and that the entire proceedings in calling the election and voting the bonds and canvassing the results and the notice of the sale of the bonds and all other proceedings in relation thereto were regular and legal.

Original application for a writ of prohibition. Alternative writ issued. Writ quashed and preemptory writ denied.

W. G. Bissell, for Plaintiff.

A. F. James, for Defendants.

Counsel cite no authorities.

SULLIVAN, C. J.—This is an original application in this court for a writ of prohibition to restrain and prohibit the city of Gooding and its mayor and council from issuing or selling negotiable coupon bonds of said city in the sum of \$9,500, or any other sum, for the purpose of purchasing a building for use as a city hall for said city.

The alternative writ was issued and the defendants made return, setting up that the city had complied with all of the provisions of the law in regard to calling and holding an election for the purpose of permitting the qualified electors of said city to vote upon the issuance of said bonds and all proceedings connected therewith.

The main contention of the plaintiff at the time of filing the complaint was that the notice of election was not published as required by law. It was afterward ascertained by

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counsel for the plaintiff that said notice had been properly published in the "Gooding Leader," a newspaper published in the city of Gooding, and the questions now presented for determination are:

1. Could the city of Gooding lawfully vote bonds for the purpose of purchasing an existing building for the use of said city as a city hall?

2. Has the city of Gooding jurisdiction and authority to expend the funds arising from the sale of such bonds for the purchase of such existing building for said city to be used as a city hall?

3. Were the proceedings of said city council in regard to the issuance of said bonds prior to the calling of the election, the proceedings calling the election, the election held thereunder and the proceedings of the city council as a board of canvassers and the notice of sale of bonds regular and legal?

After a careful examination of the record and the proceedings in relation to the issuance of said bonds, the court answers all of those questions in the affirmative, and holds that the city of Gooding could lawfully issue bonds for the purpose mentioned and that all of the proceedings in regard to voting and the issuance of said bonds were regular and legal and that such bonds are the valid and legal obligations of said city.

The alternative writ is quashed and the peremptory writ denied.

Budge and Morgan, JJ., concur.

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Argument for Appellant.

(July 8, 1915.)

STATE, Appellant, v. F. M. MICKEY, Respondent.

[150 Pac. 39.]

INVOLUNTARY MANSLAUGHTER—FACTS CONSTITUTING ELEMENTS OF—
SUFFICIENCY OF INFORMATION.

1. Where it clearly appears from the facts set forth in the information that the defendant is charged with the crime of involuntary manslaughter, and the acts or elements which constitute the offense of involuntary manslaughter are sufficiently charged to enable a person of common understanding to know what is intended, the information is sufficient, even though it fails to allege that the defendant is charged with the crime of involuntary manslaughter, and makes the general charge of manslaughter. The facts alleged, rather than the designation of the offense, control.

APPEAL from the District Court of the Third Judicial District for Ada County. Hon. Carl A. Davis, Judge.

Information charging respondent with manslaughter, to which a demurrer and motion to quash were sustained. Judgment reversed.

J. H. Peterson, Atty. Genl., E. G. Davis and T. C. Coffin, Assts., R. L. Givens, Pros. Atty., E. P. Barnes, and J. M. Parrish, Deputies, and Barber & Davison, for Appellant.

"If the substantial facts necessary to constitute the crime charged appear in the indictment or information, it will be held sufficient." (*State v. Smith*, 25 Ida. 541, 138 Pac. 1107; *State v. Sly*, 11 Ida. 110, 80 Pac. 1125; *State v. Squires*, 15 Ida. 545, 98 Pac. 413; *State v. Rathbone*, 8 Ida. 161, 67 Pac. 186.)

The guilt or innocence of the defendant is to be determined not from the allegations of the information but from the evidence introduced as bearing upon whether or not the ultimate conclusion alleged by the pleader to the effect that his conduct was so negligent as to make him criminally responsible would sustain a verdict of guilty. (*State v. Wagner*

Argument for Respondent.

(R. I.), 86 Atl. 147; *Anderson v. State*, 27 Tex. App. 177, 11 Am. St. 189, 11 S. W. 33, 3 L. R. A. 644; *Belk v. People*, 125 Ill. 584, 17 N. E. 744.)

The pleader in the case at bar by the omission of the terms "deliberately" or "wilfully" or any synonyms has cured any possible ambiguity and has placed squarely before the defendant the charge of involuntary manslaughter. (*People v. Pearne*, 118 Cal. 154, 50 Pac. 376; *Pittsburgh, C. C. & St. L. Ry. Co. v. Ferrell*, 39 Ind. App. 515, 78 N. E. 988, 80 N. E. 425; *Johnson v. State*, 66 Ohio St. 59, 90 Am. St. 564, 63 N. E. 607, 61 L. R. A. 277 (note).)

"The distinction between voluntary and involuntary manslaughter is now obsolete at common law. Any unlawful and wilful killing of a human being without malice is manslaughter and thus includes a negligent killing, which constitutes in the absence of wilfulness involuntary manslaughter." (*United States v. Meagher*, 37 Fed. 875.)

This information complies strictly with sec. 7677, Rev. Codes, and there is no showing that the information is so insufficient as to tend to prejudice a substantial right of the defendant upon the merits. (*People v. King*, 27 Cal. 507, 87 Am. Dec. 95; *People v. Cronin*, 34 Cal. 191; *Commonwealth v. Webster*, 5 Cush. (59 Mass.) 295, 52 Am. Dec. 711; *People v. Murphy*, 39 Cal. 52; *People v. Davis*, 73 Cal. 355, 15 Pac. 8; *People v. Hyndman*, 99 Cal. 1, 33 Pac. 782; *State v. Moore*, 129 Iowa, 514, 106 N. W. 16; *People v. Abbott*, 116 Mich. 263, 74 N. W. 529.)

C. H. Edwards, for Respondent.

The information is not direct and certain as to the kind of manslaughter intended to be charged, and the information can only contain the crime of involuntary manslaughter, because said defendant was held to the district court for that crime only. (*State v. McGreevey*, 17 Ida. 453, 105 Pac. 1047.)

In order to sustain conviction for involuntary manslaughter, it is necessary that it be distinctly charged in the indictment as such. (Wharton on Homicide, pp. 835, 879;

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Walters v. Commonwealth, 44 Pa. 135; *Commonwealth v. Gable*, 7 Serg. & R. (Pa.) 423; *Bruner v. State*, 58 Ind. 159; *Brown v. State*, 110 Ind. 486, 11 N. E. 447; *United States v. Hess*, 124 U. S. 483, 8 Sup. Ct. 571, 31 L. ed. 516.)

There is not a single fact alleged from which the court can tell whether or not the manner of running the car was dangerous; the only thing which would give the court any impression that the car was running in a dangerous manner is the conclusion that the prosecuting attorney has inserted in the information that the car was run negligently. He should have set out some acts on the part of the defendant upon which the state would rely to prove negligence, carelessness and lack of caution. (*United States v. Holtzhauer*, 40 Fed. 76; *People v. McKenna*, 81 Cal. 158, 22 Pac. 488; *State v. Smith*, 25 Ida. 541, 138 Pac. 1107; *Corker v. Pence*, 12 Ida. 152, 85 Pac. 388; *People v. Neil*, 91 Cal. 465, 27 Pac. 760; *Evans v. United States*, 153 U. S. 584, 14 Sup. Ct. 934, 38 L. ed. 830; *Ehrlick v. Commonwealth*, 125 Ky. 742, 128 Am. St. 269, 102 S. W. 289, 10 L. R. A., N. S., 995; *Fletcher v. State*, 2 Okl. Cr. 300, 101 Pac. 599, 23 L. R. A., N. S., 581; *State v. Lowe*, 66 Minn. 296, 68 N. W. 1094; *State v. Costello*, 62 Conn. 128, 25 Atl. 477; *Müller v. United States*, 133 Fed. 337, 66 C. C. A. 399; *State v. McFadden*, 48 Wash. 259, 93 Pac. 414, 14 L. R. A., N. S., 1140; *People v. Olmstead*, 30 Mich. 431; *State v. Whitney*, 54 Or. 438, 102 Pac. 288; *State v. Lay*, 93 Ind. 341.)

“It is an elementary rule of pleading that every material fact, essential to the commission of a criminal offense, must be distinctly alleged in the indictment.” (Joyce on Indictments, p. 259 (citing many cases); *People v. Albow*, 140 N. Y. 130, 35 N. E. 438; *Armour Packing Co. v. United States*, 153 Fed. 1, 82 C. C. A. 135, 14 L. R. A., N. S., 400; *People v. Logan*, 1 Nev. 110, 22 Cyc. 336, and citations.)

BUDGE, J.—The information in this case, leaving out the merely formal parts, is as follows:

F. M. Mickey, on or about October 11, 1914, in the county of Ada, while engaged and occupied in running and oper-

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ating a motor vehicle, to wit, an automobile, on the public highways of the state of Idaho in the county of Ada, to wit, on the Valley road, a public highway of the state of Idaho, at a point on such road at or near the intersection of Rose street and the said valley road, *did, unlawfully and feloniously run and operate said motor vehicle negligently and carelessly and without due caution by then and there driving said motor vehicle at such a rate of speed and in such a manner as to endanger the lives and limbs of persons passing by on said highway.* By reason of which said negligence, carelessness and lack of caution, the said defendant did then and thereby unlawfully and feloniously drive said automobile against the person of one Allan Pearson, thereby inflicting upon the said Allan Pearson mortal wounds, from the effects of which he died. And so the said F. M. Mickey, defendant, did, in the manner and form aforesaid, unlawfully and feloniously, but without malice, kill the said Allan Pearson, and commit the crime of manslaughter.

To this information the defendant below, and the respondent here, filed a motion in the trial court to quash, upon the ground and for the reason that said information was filed without authority, and that the defendant had never been held by an order of any magistrate for his appearance in the district court on the charge of manslaughter, except the crime of involuntary manslaughter; that the information does not charge that said defendant committed the crime of involuntary manslaughter; and does not charge, in its charging clause, the crime of involuntary manslaughter.

A demurrer was also interposed to the information by the defendant on the ground, first, that the facts stated in said information do not constitute a public offense; second, that said information does not substantially conform to the requirements of sections 7677, 7678 and 7679, Rev. Codes.

The trial court sustained both the motion to quash and the demurrer. This case is here on an appeal by the state from the order of the court sustaining the motion to quash and the demurrer.

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Sec. 7687, Rev. Codes, provides: "No indictment [or information] is insufficient, nor can the trial, judgment, or proceeding thereon, be affected, by reason of any defect or imperfection in matter of form, which does not tend to the prejudice of a substantial right of the defendant upon its merits."

Sec. 8236, Rev. Codes, provides: "Neither a departure from the form or mode prescribed by this code in respect to any pleading or proceeding, nor an error or mistake therein, renders it invalid, unless it has actually prejudiced the defendant, or tended to his prejudice in respect to a substantial right."

Sec. 7685, Rev. Codes, provides: "Words used in a statute to define a public offense need not be strictly pursued in the indictment; but other words conveying the same meaning may be used."

Sec. 7686, Rev. Codes, provides: "The indictment is sufficient if it can be understood therefrom:

"1. That it is entitled in a court having authority to receive it, though the name of the court be not stated;

"2. That it was found by a grand jury of the county in which the court was held [or that the information of the county prosecuting attorney is based upon proceedings regularly had before, and the commitment of, a magistrate];

"3. That the defendant is named, or, if his name cannot be discovered, that he is described by a fictitious name, with a statement that his true name is to the jury unknown;

"4. That the offense was committed at some place within the jurisdiction of the court, except where the act, though done without the local jurisdiction of the county, is triable therein;

"5. That the offense was committed at some time prior to the time of finding the indictment;

"6. That the act or omission charged as the offense is clearly and distinctly set forth in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended;

"7. That the act or omission charged as the offense is stated with such a degree of certainty as to enable the court

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to pronounce judgment upon conviction, according to the right of the case.”

In our opinion, all of these facts are alleged with sufficient certainty in the information. The defendant is charged with unlawfully and feloniously, negligently and carelessly, and without due caution, operating a motor vehicle by then and there driving it at such a rate of speed and in such a manner as to endanger the lives and limbs of persons passing by on the highway. And by reason of the rate of speed and dangerous manner of running said motor vehicle, such acts being the result of lack of due caution and circumspection by defendant, the motor vehicle was driven against the person of Allan Pearson, causing his death. We, therefore, think that all of the necessary facts constituting the elements of involuntary manslaughter are sufficiently charged.

Where it clearly appears from the facts set forth in the information that the defendant is charged with the crime of involuntary manslaughter, and the acts or elements which constitute the offense of involuntary manslaughter are sufficiently charged to enable a person of common understanding to know what is intended, the information is sufficient, even though it fails to allege that the defendant is charged with the crime of involuntary manslaughter, and makes the general charge of manslaughter. The facts alleged, rather than the designation of the offense, control.

We have carefully examined the briefs of counsel, and authorities cited, and have reached the conclusion that, under the rules of pleading in criminal actions prescribed by the criminal code of this state, the information is sufficient, and charges the defendant with involuntary manslaughter.

We are therefore constrained to hold that the trial court erred in sustaining the motion to quash and the demurrer to the information. The orders of the trial court are reversed and the cause remanded with instructions to the trial court to deny the motion to quash and overrule the demurrer.

Sullivan, C. J., and Morgan, J., concur.

Argument for Plaintiff.

(July 9, 1915.)

BLACKWELL LUMBER COMPANY, a Corporation, Plaintiff, v. JOHN M. FLYNN, Acting Judge of the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone, Defendant.

[150 Pac. 42.]

MANDAMUS—WILL NOT ISSUE WHEN REMEDY BY APPEAL IS PLAIN, SPEEDY AND ADEQUATE.

1. A writ of *mandamus* may be issued from this court to any inferior tribunal to compel the performance of an act which the law especially enjoins upon such tribunal as a duty.

2. In this case the acts which the law especially enjoined upon the district judge were performed when he ruled upon the demurrer and entered a judgment, and if error was committed in the performance of such duty the plaintiff herein has its remedy by appeal to this court.

3. The facts alleged in the petition examined and held to be insufficient to invoke relief by *mandamus*.

Petition for writ of *mandamus*. Demurrer sustained; alternative writ quashed, and peremptory writ denied.

John P. Gray and W. F. McNaughton, for Plaintiff.

Mandamus is a proper remedy where the judge of the inferior court refuses to proceed because of an erroneous determination by him that he has no jurisdiction. (*Hill v. Morgan*, 9 Ida. 718, 76 Pac. 323; *State ex rel. Miss. River & B. T. R. Co. v. Dearing, Judge*, 173 Mo. 492, 73 S. W. 485.)

"Where a court declines jurisdiction by mistake of law, erroneously deciding as a matter of law and not as a decision upon the facts that it has no jurisdiction, and either declines to proceed or disposes of the case, the general rule is that a *mandamus* to proceed will lie from any higher court having supervisory jurisdiction." (26 Cyc. 190.)

In practically all of the states sustaining the text in Cyc., appeal or writ of error would lie to correct error of the lower court, but the remedy by writ of error or appeal in all cases

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delayed the exercise of a right far beyond the delay that would result by *mandamus* proceeding, and on those grounds in all the cases was held to be inadequate. (*State ex rel. Hamilton v. Guinotte*, 156 Mo. 513, 57 S. W. 281, 50 L. R. A. 787.)

C. W. Beale, for Defendant.

"It is not the function of *mandamus* to reverse the orders of inferior courts or tribunals of which they had jurisdiction, but if they had jurisdiction and refused to act, then they may be compelled to act by mandate." (*Connolly v. Woods*, 13 Ida. 591, 92 Pac. 573; *Board of Commrs. v. Mayhew*, 5 Ida. 572, 51 Pac. 411.)

The grievance of the Blackwell Lumber Company is not that Judge Flynn did not act, but that he did not act as it wanted him to act. This court in the case of *State v. Whelan*, 6 Ida. 78, 53 Pac. 2, held that writ of mandate would not issue where there was an appeal from the order complained of.

MORGAN, J.—This case was commenced by filing a petition for writ of mandate to compel the above-named defendant, John M. Flynn, acting judge of the district court of the first judicial district in and for the county of Shoshone, to enter an order in an action which, it is alleged in the petition, is now pending in said court appointing commissioners to assess and determine the damages which will be suffered by the Empire Mill Company, the defendant in said action, by reason of the appropriation and condemnation of a right of way across its land for a logging railroad which the plaintiff above named desires to procure. The prayer of the petition is as follows:

"Wherefore, affiant prays this honorable court for a writ of mandate; that the proceedings hereinbefore referred to may be certified to this honorable court at such time and place as may be determined by the court; that upon the hearing of this matter a peremptory writ of *mandamus* issue, directing the said defendant to hold that the plaintiff has

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the right to condemn the lands sought in said action and to appoint commissioners to assess and determine the damages to be suffered by reason of the taking."

The petition is supported by the affidavit of one R. M. Hart, and attached to the affidavit as exhibits and made a part thereof appear a copy of the following papers: The complaint in the condemnation suit, the demurrer to the complaint, the order of the court sustaining the demurrer, the judgment dismissing the action and the refusal of the judge to appoint commissioners to assess and determine the damages. The order sustaining the demurrer, the judgment and the refusal to appoint commissioners are, omitting the title of the court and cause, as follows:

"ORDER SUSTAINING DEMURRER TO THE COMPLAINT.

"The demurrer of the defendant to the complaint of the plaintiff in the above-entitled action came on to be heard before the judge of the above-entitled court under agreement of the parties at Coeur d'Alene, Idaho, on Wednesday, the 9th day of June, 1915, plaintiff being represented by Messrs. John P. Gray and W. F. McNaughton, and the defendant being represented by Mr. Charles W. Beale; the matter was argued, submitted and taken under advisement, and the judge of the above-entitled court announced that in his opinion the lumber company cannot condemn a right of way for a logging road, whether the road is to be permanent or simply temporary, as in this case, and that the demurrer would therefore be sustained upon the ground that the complaint does not state facts sufficient to constitute a cause of action.

"Wherefore, it is ordered that the said demurrer be and the same hereby is sustained.

"Dated this 22d day of June, 1915.

"JOHN M. FLYNN,
"Judge."

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“JUDGMENT.

“The demurrer of the defendant to the complaint of the plaintiff herein having been heretofore sustained now the plaintiff announces in court that it will decline to amend and stands upon its said complaint, it is therefore

“Ordered and adjudged that the above cause be dismissed at plaintiff’s cost.

“Dated this 23d day of June, 1915.

“JOHN M. FLYNN,
“Judge.”

“The demurrer to plaintiff’s complaint in the above-entitled action having been sustained, I refuse to appoint commissioners to assess and determine the damage which defendant would sustain by reason of the condemnation and appropriation of the lands mentioned in the complaint in said action sought to be condemned.

“Dated this 23d day of June, 1915.

“JOHN M. FLYNN,
“Judge.”

An alternative writ of mandate was issued and the defendant demurred to the petition and moved to quash the writ.

We are asked, practically, to direct Judge Flynn to set aside the judgment which he has entered, overrule the demurrer which he has sustained and to grant the order appointing commissioners which he has denied.

With respect to the writ of mandate sec. 4977, Rev. Codes, provides: “It may be issued by any court except a justice’s or probate court, to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station;”

In this case the acts which the law especially enjoined as a duty upon the district judge were performed when he ruled upon the demurrer and entered the judgment, and if error was committed in their performance the plaintiff has its remedy by appeal to this court.

In case of *Lindsey v. Carlton*, 44 Colo. 42, 96 Pac. 997, the supreme court of Colorado said:

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"It is a fundamental principle that *mandamus* lies to compel the performance of a purely ministerial duty, involving no discretionary right and not requiring the exercise of judgment. It does not lie where performance of a trust is sought which is discretionary, or involves the exercise of judgment. It is also elementary that the writ cannot usurp the functions of a writ of error, or take the place of an appeal, nor will it lie against a court, unless it be clearly shown that such court has refused to perform some manifest duty."

Mr. Justice Fullerton, delivering the opinion of the supreme court of Washington, in *Re Clerf*, 55 Wash. 465, 104 Pac. 622, said:

"A *mandamus* will run to an inferior court to compel it to act when it holds a cause in abeyance and refuses to decide either one way or the other, but it does not lie to control judicial discretion."

In case of *Winfrey v. Benton*, 25 Okl. 445, 106 Pac. 853, an Oklahoma case, it is said, quoting from the syllabus:

"*Mandamus* lies to require a court to exercise its lawful jurisdiction, but not to coerce a particular judgment, or to rectify an erroneous one."

Sec. 4978, Rev. Codes, provides that the writ must be issued in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law and in this case plaintiff contends that its remedy by appeal is not plain, speedy or adequate.

The petition discloses that plaintiff is the owner of certain sawmills and of 280 acres of land upon which are quantities of valuable timber which it desires to transport to its mills and manufacture, and that some of the timber had already been cut into sawlogs; that in order to remove said timber it will be necessary to construct a logging road across the land of the Empire Mill Company, and that unless plaintiff can acquire said right of way and outlet its timber will have to remain standing and undeveloped and the logs which it has already cut will be permitted to spoil. The amount of timber cut into logs is not disclosed.

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It is further alleged as a reason the remedy by appeal is neither plain, speedy nor adequate, as follows:

“That one of the objects in seeking to appropriate the lands sought to be acquired in said action was that it is necessary at once for the plaintiff to have facilities for the removing of said timber and the development of its said lands. That an appeal would be entirely ineffectual. That this court does not meet again at Coeur d’Alene until the month of December, 1915. That under the law eminent domain proceedings are proceedings which should be of right speedily determined. That an appeal would be entirely ineffectual and inadequate and would not afford any speedy remedy whatever. That the question of time is an essential and important one, if plaintiff is to have the right to acquire and appropriate the right of way sought in said action.

“That it is prepared to log the said lands. That petitioner would be able to give employment to many additional men at its mills, if it could log said lands, and it has no other lands so situated that it can readily log the same and develop the same, and several months would be lost in making preparations to log other lands, and if the plaintiff is to have the right to condemn, as under the law it is advised by its counsel it has, the right of way sought in this action is or cannot be of any benefit to the plaintiff unless the right is given without further delay.

“Affiant further says that the plaintiff has been unable to operate a night-shift at its sawmill in Coeur d’Alene, Idaho, because of its inability to secure enough logs. That it will require considerable development and railroad building before it can procure logs from other lands owned by plaintiff entailing a delay of some months.”

Without discussing the facts above recited we will say they are not sufficient to invoke the relief sought in this proceeding.

In a case very recently decided by this court involving an application for writ of prohibition it is pointed out that in view of the congested condition of our calendar it becomes absolutely necessary, in order to expedite the business of the

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court, that we adhere strictly to the law governing writs of prohibition and *mandamus* and that we cannot take into consideration the annoyance, expense or delay incident to the prosecution of the usual remedies provided by law in determining whether or not these extraordinary writs should issue. (See *Olden v. Paxton*, ante, p. 597, 150 Pac. 40, and cases there cited.)

The demurrer to the petition is sustained, the alternative writ is quashed and the peremptory writ denied. Costs are awarded to the defendant.

Sullivan, C. J., and Budge, J., concur.

(June 22, 1915.)

ANNA BEATON and JOHN BEATON, Her Husband,
Respondents, v. CITY OF ST. MARIES, a Municipal
Corporation, Appellant.

[151 Pac. 996.]

PERSONAL INJURIES—MEASURE OF DAMAGE.

1. The right to recover damages for personal injuries sustained by a fall caused by a defective sidewalk is based upon the principle that the person injured should receive full compensation for the loss sustained with the least possible burden to the party responsible for the injury.

2. Although the amount of recovery is largely within the discretion of the jury, the verdict must be based upon the evidence, and when it is apparent therefrom that the recovery is in excess of the actual loss sustained, the judgment must be modified or vacated.

APPEAL from the District Court of the Eighth Judicial District for Kootenai County. Hon. William W. Woods, Presiding Judge.

Opinion of the Court—Morgan, J.

Action for damages for personal injuries. Judgment for plaintiffs. *Reversed conditionally.*

Taylor & Hull and McFarland & McFarland, for Appellant.

The damages awarded by the jury in this case are excessive, as respondent did not suffer any permanent or even serious injuries, and her age would preclude the recovery of any such sum of money awarded by the verdict. (*Muskogee Electric Traction Co. v. Mueller*, 39 Okl. 63, 134 Pac. 51; *Hase v. City of Seattle*, 57 Wash. 230, 107 Pac. 515; *Heath v. Seattle Taxi-cab Co.*, 73 Wash. 177, 131 Pac. 843; *McCabe v. City of Butte*, 46 Mont. 65, 125 Pac. 133; *Chicago W. D. Ry. Co. v. Hughes*, 87 Ill. 94; *Louisville & N. R. Co. v. Survant*, 96 Ky. 197, 27 S. W. 999.)

John P. Gray, Frank McCarthy and W. D. Keeton, for Respondents.

The damages awarded were not excessive. (*Hinton v. Cream City R. Co.*, 65 Wis. 323, 27 N. W. 147; *Texas P. Ry. Co. v. Davidson*, 68 Tex. 370, 4 S. W. 636; *Johnson v. St. Paul City Ry. Co.*, 67 Minn. 260, 69 N. W. 900, 36 L. R. A. 586; *Keim v. Gilmore & Pittsburg R. R. Co.*, 23 Ida. 511, 131 Pac. 656.)

MORGAN, J.—This is an action prosecuted by respondents, Anna Beaton and John Beaton, her husband, for damages for personal injuries sustained by her by a fall, due to a defective sidewalk within the corporate limits of the city of St. Maries, appellant herein. The trial resulted in a judgment in favor of respondents for \$5,100, from which and from an order overruling a motion for a new trial this appeal has been taken.

Appellant has assigned as error the action of the trial judge in overruling certain objections to questions propounded to witnesses at the trial and in sustaining others; in admitting certain documentary evidence and in refusing to admit as evidence a proffered affidavit; in denying appellant's application for a new trial; also that the evidence is insufficient to

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justify the verdict, and that excessive damages appear to have been allowed under the influence of passion or prejudice.

Our examination of the record convinces us that the trial judge committed no error in his rulings as to the admissibility of the proof offered, and, since said rulings are based upon well-established principles of law, we will not indulge in a discussion of the assignments of error predicated upon them.

We are convinced that the judgment in this case is excessive. It appears that on the evening of December 24, 1913, the respondent, Anna Beaton, while on her way from her home in St. Maries to the business section of the city, accompanied by her daughter, Mrs. Scott, and when at a point on Center street about six blocks from her home and about ten blocks from the business section, stepped into a hole or depression in the sidewalk caused by two boards being broken, and fell; that no bones were broken but that her left shoulder was severely bruised; that she continued her trip to the business section of the city and, according to her testimony, her shoulder felt numb, and while she was in the business district she was taken sick and felt faint, but that with the assistance of her daughter she walked home and that she was confined to her bed over a month and to the house for about three months. She testified that she called a physician on the second day after the accident, she thought, but the physician testified, refreshing his memory from his book, that he was first called on January 4th, which was the eleventh day after the accident.

According to Mrs. Beaton's testimony, she had not fully recovered the use of her left arm at the time of the trial, which took place nearly a year after the injury was sustained. In this she was corroborated by certain witnesses, including her physician, who testified that, in his opinion, she will never fully recover. She was contradicted by other witnesses who testified to having seen her attending to her ordinary household duties, including laundry work, at which she used both hands, and that she was apparently sound and well since shortly after the accident, including a part of the time she testified to having been confined to the house. Two physi-

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cians who examined her during the trial testified they found no evidence, from observation and measurements made, of the injury complained of.

There is evidence tending to show that both Mrs. Beaton and Mrs. Scott made statements contradictory to their testimony as to how and where the accident occurred, and the evidence is very conflicting as to the severity of the injury. The rule is well established that where there is a substantial conflict in the evidence the verdict will not be disturbed upon appeal because of insufficiency of proof, and in this case these conflicts will be deemed by the court to have been resolved by the jury, and properly so, in favor of the respondents.

On direct examination Mrs. Beaton testified that she was 69 years old, and on cross-examination and redirect examination she stated her age to be 59 years. She testified that before her injury she always had good health and was strong; that she did "housework and ranch work and all kinds of work." Giving her testimony as to the condition of her health since her injury the most favorable interpretation possible with a view to sustaining the judgment in its entirety, it appears that she is not completely disabled; that she is able to attend to her housework although the performance of her household duties is attended with inconvenience.

It appears from certain mortality tables offered in evidence that if Mrs. Beaton was 59 years old at the time of the trial, her expectancy of life was about 15.39 years from the date of her injury. While it is apparent that a woman of Mrs. Beaton's age would not retain her earning capacity, at the kind of work she was able to do prior to the accident, during the entire period of the expectancy of her life, it is also apparent that the jury in this case allowed her, although she is by no means completely disabled, considerably more than she could have expected to earn during that period had she never been injured.

The right to recover damages in cases of this kind is based upon the principle that the person injured should receive full compensation for the loss sustained with the least possible burden to the party responsible for the injury. The amount of judgment awarded should be fair compensation

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for everything of which the injured party has been deprived as a direct and proximate consequence of the wrongful act or omission of the other, and no more, and although the amount of the recovery is largely within the discretion of the jury, the verdict must be based upon the evidence, and when it is apparent therefrom that the recovery is in excess of the actual loss sustained, the judgment must be modified or vacated. (13 Cyc. 136; *Johnson v. St. Paul City Ry. Co.*, 67 Minn. 260, 69 N. W. 900, 36 L. R. A. 586; *Hase v. City of Seattle*, 57 Wash. 230, 107 Pac. 515.)

In the case last above cited the court said:

“Although damages in actions for personal injuries are to be determined by juries, there must be some reasonable limit to the awards they are permitted to make. Such damages are to be allowed for compensation only, and not as punishment or confiscation. The verdict is excessive. It extends beyond the limits of just compensation for the injuries sustained.”

It appears that because of the accident respondents have been put to an expense of \$185 for the services of a physician; allowing for that as well as for pain suffered from the injury and as compensation for damage to her health and for loss of earning capacity, we believe the judgment should be not to exceed \$1,800, together with plaintiffs' costs incurred in the district court.

The cause is remanded, with direction to the district court to grant a new trial unless within thirty days after the filing of the *remittitur* the respondents shall file in said court their written consent that the judgment be reduced to \$1,800, together with plaintiffs' costs incurred in the district court. If such consent is given, the judgment will be modified accordingly as of the date of its original entry, and, together with the order denying the motion for a new trial, will stand affirmed.

Costs upon appeal are awarded to the appellant.

Sullivan, C. J., and Budge, J., concur.

Petition for rehearing denied.

Points Decided.

(July 7, 1915.)

I. E. BENNETT, Plaintiff, v. TWIN FALLS NORTH SIDE LAND & WATER CO., a Corporation, and NORTH SIDE CANAL CO., LTD., a Corporation, Defendants.

[150 Pac. 336.]

CAREY ACT LANDS—TAXATION OF—CONSTRUCTION COMPANY—WATER RIGHTS—CONSTRUCTION OF CONTRACTS AND STATUTES—TAXATION OF WATER RIGHTS—WATER RIGHT APPURTENANT TO LAND—APPURTENANT SEPARABLE FROM LAND—WATER RIGHT NOT TAXABLE.

1. Under a Carey Act project where a construction company has entered into a contract with the state to initiate the appropriation of water and to construct canals, ditches and reservoirs for the irrigation of the land within the project, and has also the right to contract with settlers upon such lands to sell them water rights, and does contract with the settler or entryman to sell him a water right for his land, and the settler agrees to pay for such water right in annual instalments, and thereafter when his land becomes subject to taxation his land is taxed and he fails to pay the taxes, and the land is sold at tax sale and a tax deed is thereafter issued conveying the land to the purchaser or his assignee, such tax deed does not convey the water right purchased by the entryman of such land for the irrigation thereof.

2. Under the provisions of sec. 1629, Rev. Codes, the water rights referred to therein do not attach and become such an appurtenance to the land that the title to such water right is conveyed under a tax deed which conveys the title to the land where the purchase price of the water right has not been paid.

3. Under the provisions of sec. 3240, Rev. Codes, all of the waters of the state when flowing in their natural channels, including the waters of all natural springs and lakes within the boundaries of the state, are declared to be the property of the state.

4. Under the provisions of secs. 4 and 5, art. 15, of the state constitution, the state has power and authority to direct and control the appropriation of the unappropriated waters of the state, and, when the requirements of the statute are complied with, the right gained by the appropriator is a right to the use of the water.

5. Under the provisions of sec. 3056, Rev. Codes, water rights are declared to be real property or real estate.

6. When one has legally acquired a water right, he has a property right therein that cannot be taken from him for public or

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private use except by due process of law and until a just compensation shall be paid therefor.

7. A water right is an independent right and is not a servitude upon some other thing, and is an incorporeal hereditament, being neither tangible nor visible.

8. The owner of a water right, by purchase or original appropriation, may sell the water right separate and apart from his land.

9. The provisions of sec. 1644, Rev. Codes, as amended by the Laws of 1913, p. 242, exempt from taxation such a water right as the one involved in this case.

10. *Held*, under the settlers' contract that the title to the water right does not vest in the entryman until he makes full payment for the same.

11. The provisions of sec. 1629, Rev. Codes, do not make the water right an inseparable appurtenance to the land, or such an appurtenance that a tax deed transferring the title to the land would also transfer the unpaid for water right.

12. *Held*, that the purchaser of a tract of Carey Act land at tax sale may be subrogated to all of the rights of the entryman so far as the water right is concerned, and may procure title thereto by making the payments provided for by the water contract and in accordance with its terms.

An original application for a writ of mandate to the defendants, commanding the Land & Water Company to immediately assign, transfer and set over to the plaintiff forty shares of the capital stock of the North Side Canal Company and to cancel a certain lien and commanding the Canal Company to deliver to the plaintiff certain water for the irrigation of the forty acres of land described in the petition. Alternative writ quashed and peremptory writ denied.

Paul S. Haddock, for Plaintiff.

In regard to the question as to who is the real owner of a water right represented by shares of stock in a water corporation, the courts have taken the view that the companies are in the nature of carriers, and that the real title to the water right rests in the owner of the land; that the most that can be said of the corporation is that whatever title it may hold is held in trust for the real and equitable owner, that is, the user of the water. (2 *Wiel on Water Rights*, chap. 57; *Hard*

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v. Boise City Irr. etc. Co., 9 Ida. 589, 76 Pac. 331, 65 L. R. A. 407; *Creer v. Bancroft Land etc. Co.*, 13 Ida. 407, 90 Pac. 228; *Nampa etc. Irr. Dist. v. Gess*, 17 Ida. 552, 106 Pac. 993; 3 Kinney on Irrigation, 2651; *Idaho Fruit Land Co. v. Great Western Beet Sugar Co.*, 18 Ida. 1, 107 Pac. 989.)

We agree that a water right is a property interest which may at any time be separated from the land to which it was originally appurtenant, provided that this separation must be made by the person owning the land and the water right, and that the separation must not be to the injury or detriment of some other person. (*Hard v. Boise City Irr. Co.*, *supra*; *Ramelli v. Irish*, 96 Cal. 214, 31 Pac. 41; *Union Mill etc. Co. v. Dangberg*, 81 Fed. 73, 115.)

Our contention is that the water right was appurtenant to the land at the time the tax lien attached to the land, and from that time on the state and county government acquired such an interest in said land and its appurtenance to wit, its water right, and the owner no longer had the right to separate his land and water until the said tax lien was satisfied. A mortgagee would certainly have the right to object to a mortgagor separating the water right from the mortgaged land because the mortgagee's security would then be almost entirely gone. The same principle would hold good with a mechanic's lien, a tax lien or any other lien. Shares of stock in a mutual water corporation such as the North Side Canal Company is are appurtenant to the land and will pass with a conveyance of the land. (*In re Thomas Estate*, 147 Cal. 236, 81 Pac. 539; *Bank of Visalia v. Smith*, 146 Cal. 398, 81 Pac. 542.)

"Water rights are real estate for the purpose of taxation but should not be assessed separately from the lands to which they are appurtenant." (1 Wiel on Irrigation, p. 300.)

A tax deed conveys the appurtenances that were assessed and included in the tax certificate of sale, and it does not make any difference whether the appurtenances were recited in the tax deed or not. (*Bank of Lemoore v. Fulgham*, 151 Cal. 234, 90 Pac. 936.)

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Longley & Walters, for Defendants.

A water right is an independent property right, and is not a servitude upon some other thing (Kinney on Irrigation & Water Rights, secs. 769, 770), and an incorporeal hereditament, being neither tangible nor visible. (Kinney, sec. 771; *Custer Consol. Mines Co. v. City of Helena*, 45 Mont. 146, 122 Pac. 567.) It is not an inseparable appurtenance to land. (Kinney, secs. 1015, 1016.)

A tax sale of public land which is exempt from taxation conveys no title to the purchaser. (*Quivey v. Lawrence*, 1 Ida. 313; *Young v. Charnquist*, 114 Iowa, 116, 86 N. W. 205; *McGoon v. Scales*, 76 U. S. (9 Wall.) 23, 19 L. ed. 545.)

If the water right does not become an appurtenance to the land, either under the state law or contracts of the parties, by what theory can the holder of a tax deed claim it? (*Hailey v. Riley*, 14 Ida. 481, 95 Pac. 686, 17 L. R. A., N. S., 86.)

SULLIVAN, C. J.—This is an original application to this court for a writ of mandate to the Twin Falls North Side Land & Water Company, a corporation (which will hereafter be referred to as the Land & Water Company), and the North Side Canal Company, a corporation (which will hereafter be referred to as the Canal or Operating Company), commanding them to deliver water from their canal system to the plaintiff and to deliver forty shares of the capital stock of the Canal Company to the plaintiff, and to release the lien upon plaintiff's land created by the water contract with the Land & Water Company.

A general demurrer to the complaint was filed by the defendants, and it is conceded that the facts admitted by the demurrer are correctly set forth in defendant's brief, and are as follows:

1. The corporate existence of the North Side Land & Water Company and the North Side Canal Company, the parties defendant.
2. That the Twin Falls North Side Land & Water Company heretofore entered into a contract with the state of Idaho, under and pursuant to the terms of the federal law

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known as the Carey Act, as well as the statutes of the state of Idaho relating thereto, and that under and by virtue of said state contract the Land & Water Company agreed to sell water rights or shares in the irrigation system to be constructed by it to every person making entry of lands upon the segregation. The contracts specifically provide that the water right and interest in the system should be paid for by the entrymen and as by the terms of the contract provided, and such right and interest to be evidenced by shares of stock in the Canal or Operating Company, such stock to be held by the Land & Water Company until at least 35% of the payments due have been made, when the owner shall become entitled to receive the stock and vote the same.

3. That the irrigation system has been constructed and fully completed and that the Land & Water Company have in all things complied with the state and settlers' contract, both as to constructing the irrigation system contemplated therein, and making the water available in a sufficient supply for the use of the contract holder.

4. That one Belcher made entry of a certain forty acres of land in section 10, township 9 south, range 16 E., B. M., in Lincoln county, and was the owner and holder of a contract with the Land & Water Company for the irrigation and reclamation of such land, as well as the water right therefor, to be evidenced by the stock hereinbefore referred to.

5. That Belcher by assignment sold and transferred such contract to one John M. Hale, who proceeding thereunder and pursuant to the laws of the state of Idaho, made proof of reclamation of said land, and received a final certificate of such proof from the state of Idaho.

6. That no patent has been issued from the United States on the said forty acres hereinbefore referred to.

7. That the said forty acres was duly and lawfully assessed for the year 1910, and that the taxes so levied for said year have not been paid and became delinquent, and said land was thereafter sold for taxes to Lincoln county; no redemption having been made, a tax deed issued to the county of Lincoln,

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said county in turn transferring said land by deed to the plaintiff in this action.

8. The assessment above referred to against said property for the year of 1910 was upon the following valuation, as appears from the assessment-roll of said county, to wit:

Value of land	\$240.00
Value of improvements	25.00

Total valuation of property for taxation....\$265.00

that there was no separate or independent assessment, either against the water right hereinbefore referred to or the shares of stock which evidenced the same, either by said county, the state or any municipal corporation for the year of 1910.

9. That no other or further payment has been made to the Land & Water Company upon the purchase price of the water right other than the sum of \$120, and that there remains due and owing the Land & Water Company upon such water contract the balance of the consideration therefor in the sum of \$1,280.

10. That the plaintiff in this action has tendered the canal company the maintenance charge and assessments for the year of 1915, and demands the delivery of water under said water contract; but has refused to make any of the payments due and matured thereon and has denied any obligation to pay the balance of said purchase price for the water right to the Land & Water Company.

11. That the settlers' contract specifically provides "that no water shall be delivered to the purchaser from said irrigation system while any instalment of principal or interest is due and unpaid."

The issues presented for determination are: Can one by his purchase of a tax deed to land which was included in a Carey Act segregation, and for which a water right has been contracted but not paid for, require the irrigation company to lose its right to and interest in such water right until paid for according to the terms of the contract under or by which said water right was purchased, and can he legally insist that the water company shall assign to him the shares of

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stock representing said water right and insist that water be delivered to him for the irrigation of his land on the theory that such water had become an appurtenance or an integral part of the land and that the title to such water right goes with and is included in the tax deed?

The plaintiff concedes that the original owner of the water contract would have no right to receive water thereunder unless the payments required by the contract were made; but the plaintiff claims that his rights are superior to such original holder of the water contract because of the issuance of the tax deed, and contends that the water company loses its right and interest in such water right as well as the money due on such contract, simply because the water had become an appurtenance to the land and that it passed with the land to him as holder and owner of the tax deed.

The Land & Water Company, on the other hand, contends that the water right is a separate and distinct property right which does not become an appurtenance to the land in a strict legal sense; that is to say, by the use of the word "appurtenance" in the statutes and in the contract the water right does not lose its identity as a property right and become merged in the real estate and forever thereafter remain inseparable from it. It is contended by the Land & Water Company and the Canal or Operating Company that there is no fully matured water right vested in the entryman or in his successor, the plaintiff, until the water contract has been performed, or its terms complied with, and the rights to be secured by such purchase paid for.

It is also contended that under the laws of this state a water right is a separate and distinct right from the land on which the water is used or may become appurtenant, and any legislative enactment attempting to deprive an owner of such right without due process of law would be clearly unconstitutional.

The claim of the plaintiff, it appears, is based upon the following terms or provisions of the state and settlers' contract and the statutes:

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Among other things the settlers' contract contains the following: "The water which the purchaser shall have a right to conduct and receive through said canal shall be used upon, and the water shall be dedicated and become appurtenant to, the following described land and no other." Then follows a description of said land. Under the constitution and laws of the state the ownership of the *corpus* of the water is in the state, and it could not be successfully contended that anyone could make "dedication" of something not owned by him. This would necessarily apply to the word "appurtenant." In paragraph 10 of said contract the following provision is found: "The sale of water rights to the purchaser shall be a dedication of the water to the lands to which the same is to be applied; such water right to be a part of and to relate to the water right belonging to said irrigation system."

The following provision in regard to Carey Act lands is found in sec. 1629, Rev. Codes: ". . . The water rights to all lands acquired under the provisions of this chapter shall attach to and become appurtenant to the land as soon as the title passes from the United States to the state."

From the said contracts and statute, the following questions are presented: Can a holder of a tax deed to certain lands, the title to which had been acquired under the Carey Act, acquire a water right for the irrigation of such lands without paying for it? Does a construction company, proceeding under the Carey Act, by a tax deed executed upon the sale of the land for delinquent taxes, and where the tax was not levied upon the water right, absolutely lose the balance due on the purchase price for such water right under its agreement to construct an irrigation system and sell water rights therein, simply because the statute and contract provide that such water right shall be appurtenant to said land?

Under the provisions of sec. 3240, Rev. Codes, it is declared that all of the waters of the state when flowing in their natural channels, including the waters of all natural springs and lakes within the boundaries of the state, are the property of the state. (*Walbridge v. Robinson*, 22 Ida. 236, 125 Pac. 812, 43 L. R. A., N. S., 240.) The state has power and

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authority to direct and control the appropriation of such waters, and when the requirements of the statute are complied with, the right gained by an appropriator is a right to the use of the water. (Secs. 4 and 5, art. 15, State Const.) Under the provisions of sec. 3056, Rev. Codes, water rights are declared to be real property or real estate. (*Nielson v. Parker*, 19 Ida. 727, 115 Pac. 488; *Clark v. Paddock*, 24 Ida. 142, 132 Pac. 795, 46 L. R. A., N. S., 475.)

When one has legally acquired a water right, he has a property right therein that cannot be taken from him for public or private use except by due process of law and upon just compensation being paid therefor. (*Fisher v. Bountiful City*, 21 Utah, 29, 59 Pac. 520; *Knowles v. New Sweden Irr. Dist.*, 16 Ida. 217, 101 Pac. 81.) One who has acquired a legal water right can only be deprived of it by his voluntary act in conveying it to another, by abandonment, forfeiture under some statute, or by operation of law. A water right is an independent right, and is not a servitude upon some other thing, and is an incorporeal hereditament, being neither tangible nor visible. (Kinney on Irr. & Water Rights, secs. 769-771.)

It was held by this court in *Hard v. Boise City Irr. & Land Co.*, 9 Ida. 589, 76 Pac. 331, 65 L. R. A. 407, that the owner of a water right acquired such a property right therein as was transferable to other lands, and in the course of Mr. Justice Ailshie's concurring opinion it is said: "If a thing really is property, the legislature by saying it shall not be considered such cannot in fact deprive it of the character and quality which constitute it property. . . . It is a fundamental principle that every citizen has the inherent right to dispose of all his acquisitions."

In that case, however, the writer of this opinion dissented from the general conclusion reached by the majority of the court, on the ground that the water there referred to was leased from year to year, and neither the plaintiff nor his predecessor had purchased a water right nor had acquired a title to any water right other than the right to lease it from year to year for use upon a particular tract of land. My

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views then upon the question there involved and my views at the present time are set forth in that dissenting opinion.

In *Village of Hailey v. Riley*, 14 Ida. 481, 95 Pac. 686, 17 L. R. A., N. S., 86, it is held that the owner of the water right by purchase or original appropriation may sell the same separate and apart from the land.

A number of cogent reasons will be found in secs. 1015 and 1016, Kinney on Irr. & Water Rights, 2d ed., why a water right is not and ought not to be an inseparable appurtenance to land.

Under the provisions of par. 12 of sec. 1644, Rev. Codes, water rights were exempt from taxation except in case any water be sold or rented from a canal or ditch, and in such case the canal or ditch might be taxed to the extent of such sale or rental. Said paragraph and section were amended by the Laws of 1913, p. 242, but such amendment makes no change whatever so far as exempting said water rights from taxation is concerned. The water right in the case at bar is exempt from taxation, and the assessment-roll, as presented by the record, conclusively shows that the water rights involved in this case were not taxed or included in the assessment-roll and were not intended to be taxed. It is a well-recognized rule that real estate may be sold for taxes, but that such real estate must be subject to taxation and duly assessed. (*Quivey v. Lawrence*, 1 Ida. 313.) The same rule must apply to a water right since a water right is real estate. If a water right is exempt from taxation, it can never be legally assessed nor sold for taxes.

It is evident from the provisions of the settlers' contract that the purpose was not to make an absolute conveyance of the water right to the plaintiff's predecessor, since it provides, among other things, that no water shall be delivered to the purchaser from said irrigation system while any instalment, principal or interest is due and unpaid from the purchaser to the company. The state contract provides that pending the fulfillment of the contract between the entryman and the Land & Water Company, the entryman may have the right to the possession and enjoyment of the water right, and

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the entryman's contract also provides that if he does not comply with the terms of his contract, he is not entitled to the right to the enjoyment or the possession of such water, nor can it reasonably be urged that the title of the water right passes to the purchaser upon the execution of his contract with the Land & Water Company, for in the present case, as well as in practically every Carey Act project, there was no water right in existence at the time of the execution of water right contracts. There is nothing in the contract to vest the water right in the entryman unless he makes payment for the same, or that makes the water right appurtenant to any land.

Under the provisions of sec. 1629, Rev. Codes, the legislature has declared that the water rights to all lands acquired under the provisions of the chapter in which said section is found shall attach and become appurtenant to the land as soon as the title passes from the United States to the state. That statute could not and did not make the water right an inseparable appurtenant to the land any more than it could make a building situated upon land, or timber growing on land an inseparable appurtenant to the land. The owner of the realty on which he has placed buildings and has trees growing may sell the building without selling the land, and also may sell the growing timber without selling the land, and the purchaser may remove them from the land.

If as soon as an entryman makes a contract for the purchase of water from a construction company to irrigate his land the water becomes an inseparable appurtenant to such land, the terms of the contract which provide that the Land & Water Company may refuse to deliver water unless payments are made in accordance with the contract would be absolutely without any value or force whatever, and the entryman would secure his water without regard to his payment therefor. No such inequitable construction of said contracts would be tolerated by any court.

In case the Land & Water Company must see that all taxes are paid on the lands within its project, or must bid the land in at tax sale in order to protect its water rights, the

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very object and purpose for which the Land & Water Company was organized would be entirely defeated. It would be required to go into the land business, or buying and selling land and farming and making application of the water to the lands in order to protect the water rights. Said Land & Water Company is simply a Carey Act construction company, formed only for the purpose of acquiring a right to the use of water which it temporarily holds, in a certain sense, as trustee for the prospective entryman, and which water right the entryman perfects by the application of the water to the reclamation of such lands. The Land & Water Company at no time has a perfected water right in the sense that it has applied the water to the reclamation of land. In fact, it would be impossible for it to perfect a water right, as it holds no land upon which the water could be used, and it only complies with the legal forms in the initiation of the water rights for and on behalf of the prospective settlers, while the settler, by an application of the water to a beneficial use, perfects the water right and keeps and maintains the same alive, or prevents, by the use of water, such right from lapsing.

The Land & Water Company as a construction company acquires, builds or constructs nothing for itself, but does so for the Canal or Operating Company and settler, and the entrymen own, operate and control the water rights and canal system through the medium of the Canal Company, in which they all become share or stockholders by making the payments for their water rights. Under the law and the decisions of this court, a water right is a distinct property right from the land on which it is used, and the water right being a separate and distinct right was not included in the assessment involved in this case, and could not have been, for the reason that such right is exempt from taxation under our laws.

The assessment-roll, including the land involved in this case, for the year 1910, is substantially set forth in the facts admitted by the demurrer and above given. There was no attempt in said assessment to assess the water right, as it is not mentioned on said assessment-roll; and even if the

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assessor had attempted to assess the water right, he could not have legally done so, since it is exempt from taxation.

It appears from the record that the plaintiff is claiming his right to something he has not paid for. He is claiming a water right that was conditionally sold by the Land & Water Company to his predecessor for \$1,400, on which purchase price he had paid \$120, leaving a balance of \$1,280. The Land & Water Company expended a vast amount of money in building a canal system so as to enable it to sell water rights and conduct the water to the place of intended use, relying upon such sales for its sole compensation for the cost of construction. To have such water rights taken from it without compensation would certainly work a manifest injustice to it, and to require the Land & Water Company to protect its water rights by the expenditure of a large sum of money in the payment of taxes on lands that it has no interest in whatever, not only would impose a heavy burden on the company but would force it, as above intimated, into the real estate business upon a large scale, and into a business contrary to its original purpose and object. As stated in the brief of counsel, its stockholders and promoters, while willing to hazard their money in construction work, might well object to farming operations and kindred activities. And yet, this is precisely what must happen if it should be held that the plaintiff can compel the delivery of water under this application. The plaintiff under his tax deed stands in the shoes and has all of the rights of the original entryman to comply with said water contract and to make payments in accordance with its terms and thus secure a water right for his said land. That is the correct rule in this class of cases, and the Land & Water Company or the Canal Company could be compelled to furnish him water in accordance with the terms of the contract upon his making the payments as therein stipulated.

We therefore conclude that the alternative writ heretofore issued in this case must be quashed and that the peremptory writ be denied. Costs are awarded to the defendants.

Budge and Morgan, JJ., concur.

Points Decided.

(July 16, 1915.)

J. R. JONES, Plaintiff, v. POWER COUNTY, IDAHO, W. S. SPARKS, M. E. WALKER, and C. F. EGGERS, as Members of and Constituting the Board of County Commissioners of said County, F. NETTIE RICE, as County Treasurer and Tax Collector, PAUL BULFINCH, as Clerk of the Board of County Commissioners and County Auditor, O. F. CROWLEY, as County Assessor, and KEELER BROTHERS, a Corporation, Defendants.

[150 Pac. 35.]

NEWLY ORGANIZED COUNTIES—LAWS APPLICABLE TO—POWERS AND DUTIES OF BOARDS OF COMMISSIONERS—EXPENDITURES—INDEBTEDNESS—FUNDING BONDS—CONSTITUTIONAL LAW.

1. The general laws of the state applicable to new counties authorize them to cause to be transcribed certain records; to provide furniture, fixtures, record books, etc., and to provide county jails. The ordinary and necessary expenses of a new county include expenditures for these purposes and the county commissioners are not prohibited from making such expenditures, when necessary, in order to place the county government in operation, without submitting the question to a vote of the electors, even though the indebtedness thereby incurred exceeds the income and revenue provided for the county for that year.

2. Although the act of the legislature creating a new county provides that its commissioners shall make provision for the payment of any bonded indebtedness which may be apportioned to it, by levy and taxation at the time fixed by law for so doing, and in the same manner as the commissioners of the counties from which its territory is derived, should or could have done, that method of taking care of such indebtedness is not exclusive, and it was competent for the legislature to and it did permit the additional method provided in chap. 20, Sess. Laws 1915.

3. Chap. 20, Sess. Laws 1915, provides a means whereby the warrant indebtedness of counties, situated as is Power, may be extinguished by the issuance of funding bonds, and that chapter governs this case.

4. A statute is general if its terms apply to, and its provisions operate upon, all persons and subject matters in like situation. Chap. 20, Sess. Laws 1915, examined and held to not contravene

Argument for Plaintiff.

sec. 5 of art. 18 or sec. 19 of art. 2 of the constitution of Idaho, providing that "the legislature shall establish, subject to the provisions of this article, a system of county government which shall be uniform throughout the state; and by general laws shall provide for township or precinct organization"; also "the legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: Regulating county and township business or the election of county and township officers."

Petition for writ of prohibition. Alternative writ quashed; peremptory writ denied.

O. R. Baum, for Plaintiff.

The expenses intended by the framers of the constitution to be included in the term "ordinary and necessary" are such as recur with regularity and certainty, and are generally within the usual income and revenue and have some fairly well-defined limits. It was held in *Brown v. City of Corry*, 175 Pa. 528, 34 Atl. 854, 855, that any expense that recurs with regularity and certainty and is necessary for the existence of a municipality is an ordinary expense of that municipality. The expense of building a jail costing \$4,693.75 is not an expense which recurs regularly or irregularly in the existence of a county. It is an unusual and extraordinary expense. It would be unjust to the taxpayers of the county and contrary to the plain intent of the constitution to leave the board of county commissioners without any restrictions and permit a large indebtedness for a jail to be thrust upon the taxpayers at the very outset of the county's organization. (*Bannock County v. Bunting & Co.*, 4 Ida. 156, 37 Pac. 277.)

Our position is upheld by the decision of this court in the case of *Peavy v. McCombs*, 26 Ida. 143, 140 Pac. 965, wherein it is held that sec. 99, chap. 58, Session Laws of 1913, requires that all warrant indebtedness of a county shall be liquidated only by levy and taxation, and cannot be taken care of through the issuance of funding bonds. The act applies only to counties organized under acts of the state legislature approved subsequent to Jan. 1, 1911. It does not operate in all counties of the state. "To make a classi-

Argument for Defendants.

fication good, it must be founded on differences and characteristics sufficiently marked and important to make them naturally a class by themselves." (*Alexander v. City of Elizabeth*, 56 N. J. L. 71, 28 Atl. 51, 23 L. R. A. 525, 529.)

Richards & Haga, for Defendants.

No expense could more properly be specified as part of the ordinary and necessary expense of the new county than the cost of erecting a jail. An expense need not be one which regularly recurs in order that it may be an ordinary and necessary expense within the meaning of the constitutional provision. (*Hickey v. City of Nampa*, 22 Ida. 41, 124 Pac. 280.)

"It is, of course, the duty of commissioners to provide a suitable place for the holding of the courts and public offices, jails, etc., but such rooms must be temporarily provided, at as little expense as is consistent with providing suitable quarters, until the question can be submitted to the people." (*Bannock County v. Bunting & Co.*, 4 Ida. 156, 37 Pac. 277.)

The bonded indebtedness assumed by Power county from the counties out of which it was created is not required to be liquidated by annual levy and taxation. (*Frazier v. Hastings*, 26 Ida. 623, 144 Pac. 1122.)

Since prior to the first session of the state legislature, a statute has been in existence in Idaho (sec. 3602, Rev. Codes); authorizing counties to fund their outstanding indebtedness, and the personnel of the court, contemporaneous with the statute and with the constitutional convention, specifically held that the words "any indebtedness" in the statute included warrant indebtedness. (*Bannock County v. Bunting*, *supra*.)

Subsequent to the decision of the court in the Bannock county case, the statute was amended so as to specifically mention warrant indebtedness. It further appears that at the first session of the state legislature subsequent to the decision of this court in *Peavy v. McCombs*, 26 Ida. 143, 140 Pac. 965, an act was passed, being chap. 20, Sess. Laws of

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1915, which again specifically authorized counties to take up their outstanding warrant indebtedness by the issuance of bonds. "It is an elementary rule that constitutions are to be construed in the light of previous history and the surrounding circumstances." (*State v. Sedgwick*, 46 Mont. 187, 127 Pac. 94, 95.)

"One of the methods clearly authorized by this section of the constitution (sec. 15, art. 7) for bringing the business of the counties to a cash basis was and is by issuing bonds for the purpose of taking up outstanding warrants and funding bonds." (*Bannock County v. Bunting & Co.*, 4 Ida. 156, 37 Pac. 277.) The act is of uniform operation in all counties now existing to which it applies, and the act also applies to any and all counties which may be hereafter formed, organized or created; and it is therefore not special legislation. (Dillon on Municipal Corp., 5th ed., secs. 142, 144.)

It is not necessary that the reasons for the act appear upon its face. (*State v. Derbyshire*, 79 Wash. 227, 140 Pac. 540.)

A case directly in point upon the validity of an act relating to certain public improvements authorized in cities which had been organized since a particular date is the case of *Owen v. City of Sioux City*, 91 Iowa, 190, 59 N. W. 3.

"We must assume that, if a state of facts could exist which would justify such legislation, it actually did exist when the statute under consideration was passed." (*Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77.)

MORGAN, J.—This is an original proceeding to procure the issuance of a writ of prohibition. The plaintiff is a resident and taxpayer of Power county and the defendants W. S. Sparks, M. E. Walker and C. F. Eggers are members of and constitute the board of county commissioners; the defendant F. Nettie Rice is county treasurer and tax collector, the defendant Paul Bulfinch is clerk of the district court and *ex officio* auditor and recorder and clerk of the board of county commissioners, and the defendant O. F. Crowley is county assessor of said county.

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Power county was created by an act of the legislature approved January 30, 1913, of territory segregated from the counties of Cassia, Bingham, Blaine and Oneida. Pursuant to the provisions of chap. 6 of the Sess. Laws of 1913, p. 30, creating the county, the amount of its proportion of the indebtedness of the counties from which it derived its territory was ascertained and apportioned to it, and on June 24, 1915, there remained unpaid upon the indebtedness the sum of \$49,885, exclusive of interest, of which amount \$18,360 was due to Oneida county and \$31,525 was due to Blaine county.

Various expenses were incurred incident to the organization of the county including that of transcribing and certifying records, the purchase of furniture, record books and office supplies; there was also an expense of \$4,693.75 incurred in the erection of a jail, for all of which warrants were issued.

It appears that a considerable portion of these expenses, incident to organization, have been paid, from time to time, out of money from the current expense fund, and that the county has been unable, because of said fund being thus depleted, to redeem some of its warrants which have been issued to meet current expenses. The total warrant indebtedness of the county amounted, on June 24, 1915, to the sum of \$88,144.31, which, with accrued interest, exceeded the sum of \$90,000.

On the 24th day of June, 1915, the board of county commissioners met in special session pursuant to notice, and thereupon ascertained and determined that the items composing said amount of \$88,144.31, together with accrued interest of approximately \$2,000, constituted binding and subsisting obligations of Power county, and made and entered of record a certificate of such determination, and thereupon made and entered of record a resolution declaring that they deemed it advisable and for the best interest of the county that funding bonds in the sum of \$90,000 be issued to provide funds with which to pay and discharge a like amount of said outstanding warrant indebtedness, and authorized the issuance of such bonds for that purpose. Thereafter negotiable fund-

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ing bonds of said county, aggregating the sum of \$90,000, were issued, which issue was composed of 180 bonds for \$500 each, being numbered from 1 to 170, inclusive, and series B bonds being numbered from 171 to 180, inclusive, each bond being dated January 1, 1915, and bearing interest from date until paid at the rate of 6% per annum, payable semi-annually on January 1st and July 1st of each year. These bonds were negotiated and sold to the defendant Keeler Brothers, a corporation. The board of county commissioners on June 24, 1915, also made and entered an order that the interest falling due on said bonds on July 1, 1915, amounting to \$2,700, be paid by the county treasurer out of any moneys in the current expense fund.

The purpose of this proceeding is to prohibit the defendants in their respective official capacities from paying or causing to be paid out any moneys of the county in liquidation of this bonded indebtedness, either principal or interest, and from taking any steps in the levying or collection of taxes for the purpose of raising funds to pay the same.

The plaintiff contends that the proposed payment of \$2,700 or of any sum of money on the interest falling due on July 1, 1915, and the proposed extension on the records and tax-rolls, and the subsequent collection of taxes attempted to be levied for the payment of the principal and interest of said funding bonds, are illegal and in excess of the jurisdiction of each and all of the defendants.

This bond issue was made pursuant to the provisions of sec. 1, chap. 20, p. 72, Sess. Laws 1915, which is as follows:

“The Board of County Commissioners of any new county which may have been formed, organized or created pursuant to the acts of the Legislature of the State of Idaho, approved subsequent to the first day of January, A. D. 1911, or which may be hereafter formed, organized or created, may in the exercise of its judgment and discretion when deemed advisable and in the interest and for the benefit of the county, and to enable such county to be placed as near as may be on a cash basis, issue and negotiate coupon bonds at such time and

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in such manner and upon such terms as are deemed for the best interests of the county, in order to provide funds with which to pay and entirely discharge any part, either on all of the warrant, bonded, floating or other indebtedness or obligations which may have been either assumed or are owing by such new county to the county or counties out of which such new county was formed or the indebtedness incurred by such new county in the transcribing and certifying of records and the preparing of indexes, in the purchase and providing of books, records, furniture, fixtures, office supplies, safes, vaults and a jail, in the employment of accountants and appraisers and for other ordinary and necessary equipment and expense incident to the organization of such new county, or an amount of the then outstanding warrant indebtedness of such new county equal to the amount previously expended by such new county for the purpose or purposes herein above mentioned, and such bonds shall constitute a legal charge and obligation of the county. All such bonds shall conform to, and provisions be made for their payment in accordance with the provisions of Sections 1960, 1963, 1965 and 1967 of the Revised Codes of Idaho as amended; Provided, That before the Board of County Commissioners of a county shall issue bonds under the provisions of this Act, the Board must first ascertain and determine that the particular bonded, warrant or other indebtedness, of the county, proposed to be retired by the bond issue constitutes binding and subsisting obligations of the county, and they shall thereupon cause a certificate of determination to be made and entered in and upon the records of said Board and the findings of said Board shall thereafter be conclusive as a basis for the issuance of such bonds and the levy and collection of taxes for their payment; Provided, further, That no bonds issued pursuant to the provisions of this Act shall in any wise increase the principal amount of the existing indebtedness of the county; and Provided further that this Act shall not in any wise be construed as a repeal of any of the power and authority vested in the Board of County Commissioners of any new county by act of the Legislature particularly relating to such new county."

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It is urged by plaintiff that, since the cost of the jail created a liability against the county during the year, it was incurred in excess of the income and revenue provided for it for such year without the assent of two-thirds of the qualified electors thereof, the outstanding warrants issued in payment for its construction were issued in violation of sec. 3, art. 8 of the constitution of Idaho, and do not represent a legal charge nor a binding or subsisting obligation against the county.

Under the proviso of sec. 3, art. 8, the prohibitions therein expressed do not apply to the ordinary and necessary expenses authorized by the general laws of the state. The general laws of the state applicable to new counties authorize them to cause to be transcribed certain records of the counties from whence they are taken; to provide furniture, fixtures, record books, etc., and to build county jails, when necessary, without submitting the question to a vote of the electors of such counties. The ordinary and necessary expenses of a new county include the expenditures above referred to. To hold otherwise would prevent the new county government from going into operation until the question of the expense of procuring copies of the records, erecting a jail and procuring offices, furniture and equipment necessary for the conduct of the business of the county, was submitted to a vote. Neither the framers of the constitution nor the legislature intended that it should be necessary to submit such a question to the electors. When a county organization is complete and the county government is in running operation, expenditures over and above those mentioned in sec. 2, art. 8 of the constitution must be submitted to the voters.

The only question we have had any doubt about is as to the validity of the bonds covering the item of the cost of constructing the jail, amounting to nearly \$4,700. Of course the commissioners of a new county have no authority to run it into debt for the construction of an unnecessarily expensive jail. The law contemplates that business sense and good judgment will be used in such matters and that no more money will be expended for a jail than is necessary for the

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proper housing and detention of county prisoners. It is not contended that the amount expended for that purpose was extravagant or more than was really needed under the facts and circumstances of the case.

Plaintiff further contends that since the act of the legislature creating Power county provides that its commissioners shall make provision for the payment of any bonded indebtedness which may be apportioned to it, by levy and taxation at the time fixed by law for so doing and in the same manner as the commissioners of the counties of Oneida, Bingham, Blaine and Cassia should or could have done, no alternative remains, and this indebtedness must be met in that way and no other. The method of taking care of the indebtedness in question provided in the act creating the county is not exclusive. It was competent for the legislature to and it did permit the additional method provided in chap. 20, Sess. Laws 1915, above quoted.

It is further urged that under the provisions of sec. 15, art. 7, of the constitution as made operative by chap. 58 (p. 173), Sess. Laws 1913, all warrant indebtedness must be liquidated by annual levy and taxation, and cannot be taken care of by issuing funding bonds, and the case of *Peavy v. McCombs*, 26 Ida. 143, 140 Pac. 965, is cited in support of this contention.

It must be borne in mind that since the enactment of said chap. 58 and since the decision of the case of *Peavy v. McCombs*, chap. 20 of Sess. Laws 1915, was enacted, and there being no constitutional prohibition against the legislature providing means whereby warrant indebtedness of counties, situated as is Power, may be extinguished by the issuance and sale of funding bonds, the legislative act last above mentioned governs this case.

Finally, it is contended that chap. 20 of Sess. Laws 1915, is unconstitutional, because it violates sec. 5, art. 18, and sec. 19, art. 3, of the constitution of Idaho. These sections are as follows:

“Sec. 5, Art. 18: The legislature shall establish, subject to the provisions of this article, a system of county governments

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which shall be uniform throughout the state; and by general laws shall provide for township or precinct organization.”

“Sec. 19, Art. 3: The legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: Regulating county and township business, or the election of county and township officers.”

This contention is based upon the fact that the legislative act in question is not made applicable to all the counties in the state, nor even to all of those still owing indebtedness incurred incident to their organization, but is confined to those which were formed, organized or created pursuant to acts of the legislature approved subsequent to January 1, 1911, and to those which may have been or may hereafter be formed, organized or created subsequent to the enactment of said chapter.

A statute is general if its terms apply to, and its provisions operate upon, all persons and subject matters in like situation. (See Dillon on Municipal Corporations, 5th ed., sec. 142.) The true test seems to be: Is the classification capricious, unreasonable or arbitrary?

The case of *Owen v. Sioux City*, 91 Iowa, 190, 59 N. W. 3, in which was under consideration an act of the legislature, by its terms made applicable only to cities of a certain class organized since January 1, 1881, seems to us to be in point and decisive of this contention. It is said therein:

“Will the act be declared unconstitutional, when facts are judicially known to exist that would be a legal basis for classification, because a date is used as a basis, and not such facts? That the legislature relied upon the date as a reason for its act, in any other sense than as it served as a means by which the law was made to meet the conditions and circumstances leading to its enactment, no one can believe. Of course the law was not made because of the date. It was made to meet conditions and wants, existing or anticipated, of a class of cities, and the date was but the separating point whereby other cities were excluded from the operation of the law. That it makes another classification of cities than those based on population is not fatal to the act, because, as we have

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said, the classification on the basis of population is by legislative action, and there is nothing prohibiting such further classification as the legislature may think proper; and the only proper inquiry as to classification in the case at bar is, is the act, because of the classification adopted, without that uniformity of operation contemplated by the constitution? We think not. . . . We are not aware of any rule whereby an act of the legislature must specify the conditions on which its validity must depend, but, on the contrary, the court will assume the existence of such conditions until it is apparent that they do not exist. In *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77, wherein the supreme court of the United States had under consideration the constitutionality of a state law, this language is used: 'For our purposes, we must assume that, if a state of facts could exist which would justify such legislation, it actually did exist when the statute under consideration was passed. For us the question is one of power, not of expediency. If no state of circumstances could exist to justify such a statute, then we may declare this one void; but if it could, we must presume it did.' "

It is a part of the political history of Idaho that 14 of our 37 counties have been created by acts of the legislature approved since January 1, 1911, and many of them are financially weak and ill-prepared to meet at once the burdensome expenses incident to organization and to discharge, as it falls due, their proportionate share of the warrant and bonded indebtedness of their parent counties. It seems to us to be probable that the legislature, having in mind the difficulties with which these new counties were confronted, enacted said chapter 20 as a means whereby the date of liquidation of their indebtedness might be deferred, and did not include therein the older counties of the state because it was not considered the same necessity existed in their case.

We conclude the bonds in question are valid obligations of Power county. The alternative writ of prohibition is quashed and the peremptory writ denied. Costs are awarded to the defendants.

Sullivan, C. J., and Budge, J., concur.

Argument for Appellant.

(September 2, 1915.)

NORTHERN PACIFIC RAILWAY COMPANY, Appellant,
v. WILFRED L. GIFFORD, Respondent.

[151 Pac. 909.]

CORPORATION TAX—CONSTITUTIONAL LAW.

1. The decision of this court in case of *Northern Pacific Railway Company v. Gifford*, 25 Ida. 196, adhered to.

APPEAL from the District Court of the Second Judicial District for Nez Perce County. Hon. Edgar C. Steele, Judge.

ACTION by plaintiff to recover from Wilfred L. Gifford, Secretary of State, a license tax paid under protest. Judgment for defendant. Plaintiff appealed. *Affirmed*.

James E. Babb, for Appellant.

In the concurring opinion of the chief justice in *Pullman Co. v. Kansas*, 216 U. S. 56, 68, 69, 30 Sup. Ct. 232, 54 L. ed. 378, it was said: “. . . The imposition on a corporation which has the right to do interstate commerce business within the state of an unconstitutional burden for the privilege of doing local business is, in my opinion, the exact equivalent of placing a burden on its interstate commerce business.”

The case of *Ohio River & W. R. Co. v. Dittey*, 232 U. S. 576, 34 Sup. Ct. 372, 58 L. ed. 737, is entirely distinguishable from the Idaho statute, chapter 6, Laws Special Session 1912, where the yardstick for measuring the tax is the capital stock, which furnishes no means of separation between the intrastate and interstate business, nor is it material that the tax is limited to a percentage on graduated amounts of stock up to a designated maximum. This kind of limitation does not square with the distinction between interstate and intrastate business. It simply shows a purpose to keep the excise reasonable in amount, but does not show a purpose to limit the same to receipts from intrastate as distinguished from

Argument for Respondent.

interstate commerce. The Dittey case does not interfere with the distinction made in *Pullman Co. v. Adams*, 189 U. S. 420, 23 Sup. Ct. 494, 47 L. ed. 877, to the effect that if the receipts from intrastate business do not equal the expenses of such business, the tax would have to be paid out of receipts from interstate business and therefore be a burden upon interstate commerce.

As a matter of federal limitation of state authority by the commerce clause of the constitution, it becomes material to know whether the tax imposed by state authority was paid by receipts from interstate commerce. (*Albert Pick & Co. v. Jordan*, 169 Cal. 1, 145 Pac. 506.)

The court erred as to the second cause of action in that the Clearwater company was not doing business in the state, as "doing business" is used in sec. 2, art. 7, Idaho Constitution, and in chap. 6, Laws 1912. (*McCoach v. Minehill etc. R. Co.*, 228 U. S. 295, 33 Sup. Ct. 419, 57 L. ed. 842; *United States v. Nipissing Mines Co.*, 206 Fed. 432, 124 C. C. A. 313; *Abrast Realty Co. v. Maxwell*, 206 Fed. 333.)

J. H. Peterson, Attorney General, T. C. Coffin, E. G. Davis and Herbert Wing, Assts., for Respondent.

The state may impose such conditions as it deems proper upon permitting a foreign corporation to do business within its borders. (*Horn Silver Min. Co. v. New York*, 143 U. S. 305, 12 Sup. Ct. 403, 36 L. ed. 164.)

It is not every burden affecting interstate commerce which is unconstitutional. (*Galveston, H. & S. A. Ry. Co. v. Texas*, 210 U. S. 217, 28 Sup. Ct. 638, 52 L. ed. 1031.)

The controlling question in determining the validity of state statutes imposing taxes upon foreign corporations doing business within the state is whether the exactions are an excise or a property tax. (*Society for Savings v. Coite*, 73 U. S. (6 Wall.) 594, 18 L. ed. 897; *Hamilton Mfg. Co. v. Massachusetts*, 73 U. S. (6 Wall.) 632, 18 L. ed. 904; *Provident Institution v. Massachusetts*, 73 U. S. (6 Wall.) 611, 18 L. ed. 907; *Home Ins. Co. v. New York*, 134 U. S. 594, 10 Sup. Ct. 593, 33 L. ed. 1025; *State of Maine v. Grand Trunk Ry.*

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Co., 142 U. S. 217, 12 Sup. Ct. 163, 35 L. ed. 994; *White Dental Mfg. Co. v. Commonwealth*, 212 Mass. 35, Ann. Cas. 1913C, 805, 98 N. E. 1056.)

"Franchise," as used in the term "franchise tax," has a different meaning, and refers to a different element than when used to describe property under the revenue *ad valorem* laws. (*Louisville & N. R. Co. v. Hopkins*, 121 Ky. 850, 90 S. W. 594; *Home Ins. Co. v. New York*, *supra*; *Paul v. Virginia*, 75 U. S. (8 Wall.) 168, 19 L. ed. 357.)

The legislature has authority to impose license taxes. (Const., sec. 2, art. 7; *State v. Doherty*, 3 Ida. 384, 29 Pac. 855; *State v. Union Central Life Ins. Co.*, 8 Ida. 240, 67 Pac. 647; *In re Gale*, 14 Ida. 761, 95 Pac. 679.)

It is essential to a decision in this case that the principles of the following two cases be reconciled: *State of Maine v. Grand Trunk Ry. Co.*, 142 U. S. 217, 12 Sup. Ct. 163, 35 L. ed. 994; *Western Union Tel. Co. v. Kansas*, 216 U. S. 1, 30 Sup. Ct. 190, 54 L. ed. 355.

As to foreign corporations seeking to do business within the state, the state is the master, and may prohibit or tax such business at will. (*Bank of Augusta v. Earle*, 13 Pet. 519, 539, 10 L. ed. 274, 284; *Security Mutual Life Ins. Co. v. Prewitt*, 202 U. S. 246, 6 Ann. Cas. 317, 26 Sup. Ct. 619; 54 L. ed. 378.)

A property tax must be proportional and reasonable. An excise tax need not be proportional, but must be reasonable. (*White Dental Co. v. Commonwealth*, *supra*; *Western Union Tel. Co. v. Kansas*, 216 U. S. 1, 30 Sup. Ct. 190, 54 L. ed. 355; *Pullman Co. v. Kansas*, 216 U. S. 56, 30 Sup. Ct. 232, 54 L. ed. 378.)

MORGAN, J.—This action was commenced by the above-named appellant for the purpose of recovering from the respondent the sum of \$480, together with interest thereon, which appellant and the Clearwater Short Line Railway Company and the Northern Express Company had paid under protest to respondent, while he was Secretary of State, as corporation license fees exacted of said companies pursuant

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to the provisions of chapter 6 of the session laws of the extraordinary session of the legislature of 1912, which enactment, it is contended by appellant, violates certain provisions of the constitution of the United States. The Clearwater Short Line Railway Company and the Northern Express Company assigned their claims to appellant prior to the commencement of the action. The respondent demurred to the complaint upon the ground that it does not state facts sufficient to constitute a cause of action, the demurrer was overruled, the respondent refused to further plead, and a judgment was entered granting the relief prayed for by appellant, from which the respondent appealed. On November 22, 1913, this court reversed the judgment and order overruling the demurrer and directed the district judge to sustain the same. (*Northern Pacific Ry. Co. v. Gifford*, 25 Ida. 196, 136 Pac. 1131.) Thereupon, the judge of the district court made and entered an order sustaining the demurrer and, appellant electing to stand upon its complaint, it was further adjudged and decreed that the action be and it was dismissed. In order that final action may be had upon the case by the state courts, this appeal has been prosecuted from the judgment last mentioned.

The facts of this case and the law applicable thereto are very fully stated and discussed in the former decision and will not be repeated here. Counsel for appellant has directed our attention to the case of *Ohio River & W. R. Co. v. Ditley*, 232 U. S. 576, 34 Sup. Ct. 372, 58 L. ed. 737, decided by the supreme court of the United States on February 24, 1914. We have carefully examined the opinion of the court in that case and find nothing therein which prompts us to alter the views expressed in our former decision.

The judgment of the district court sustaining the demurrer and dismissing the action is accordingly affirmed. Costs are awarded to the respondent.

Sullivan, C. J., and Budge, J., concur.

Points Decided.

(September 11, 1915.)

In re Application of ED CRANE for Writ of Habeas Corpus.

[151 Pac. 1006.]

CONSTITUTIONALITY OF ACT PROHIBITING SALE, MANUFACTURE, TRANSPORTATION OR POSSESSION OF INTOXICATING LIQUORS IN PROHIBITION DISTRICT—PROHIBITION DISTRICT DEFINED—POLICE POWER—SUFFICIENCY OF TITLE—LEGISLATION GENERAL AND NOT SPECIAL OR LOCAL—USE OF ALCOHOL FOR SCIENTIFIC PURPOSES DEFINED.

1. Chapter 11, Session Laws 1915, providing, among other things, that it shall be unlawful for any person, firm, company or corporation, its officers or agents, to sell, manufacture or dispose of any intoxicating liquor or alcohol of any kind within a prohibition district, or to have in his or its possession, or to transport, any intoxicating liquor or alcohol within a prohibition district, unless the same shall have been procured and is so possessed and transported under a permit as in said act provided, is not in contravention of section 1 of the fourteenth amendment to the constitution of the United States, nor of section 13, article 1 of the constitution of Idaho. It was passed by the legislature with a view to the protection of the public health, public morals and public safety, and has a real and substantial relation to those objects; and is, therefore, a reasonable exercise of the police power of the state.

2. The object of the title of an act is to give a general statement of the subject matter, and such a general statement will be sufficient to include all provisions of the act having a reasonable connection with the subject matter mentioned and a reasonable tendency to accomplish its purpose. It is sufficient if the act treats of but one general subject and that subject is expressed in the title.

3. *Held*, that chapter 11, Session Laws 1915, is not in conflict with article 3, section 16 of the constitution, and is not, therefore, unconstitutional or void.

4. Said chapter is of general application to every county in the state alike; and with the electors of the respective counties or their boards of county commissioners, or municipal authorities of any incorporated city or village, is left the decision to accept or reject its terms and conditions. It is, therefore, neither a local nor a special act, but a general law, and not in conflict with section 19, article 3 of the constitution.

5. The chapter expressly provides for the purchase and possession of pure alcohol to be used for scientific purposes. *Held*,

Argument for Petitioner.

that the practice of medicine, surgery, dentistry and dental surgery are sciences, and that pure alcohol may be lawfully procured under the terms of the law in question in the manner provided therein for use in the practice of these professions or for any other scientific purposes.

6. A prohibition district within the meaning of chapter 11, Session Laws 1915, is any county or incorporated city or village wherein the manufacture, sale, possession, keeping for sale, transportation for sale or gift of intoxicating liquors for beverage purposes is declared unlawful, whether such prohibition district be established by constitutional amendment, legislative enactment, adoption of the provisions of the local option law, or by refusal of municipal authorities or county commissioners to grant saloon licenses.

7. Held, that the provisions of the chapter are effective in all such prohibition districts within the state, whether created before or after its adoption.

Application for writ of *habeas corpus*. Writ quashed.

A. H. Oversmith and J. H. Forney, for Petitioner.

It has been held by all the courts of last resort in the United States, passing upon statutes similar to the one under discussion, that such statutes, prohibiting the mere possession of intoxicating liquor for one's own use, are not a legitimate exercise of the police power, in that such possession is not inherently injurious to the health, morals or safety of the public, and that the enactment of such statutes is an attempt at the abridgment of the privileges and immunities of the citizen, without legal justification, is confiscation of property without due process of law, and that such statutes are void. (*Commonwealth v. Campbell*, 133 Ky. 50, 117 S. W. 383, 19 Ann. Cas. 159, 24 L. R. A., N. S., 172; *Eidge v. Bessemer*, 164 Ala. 599, 51 So. 246, 26 L. R. A., N. S., 394; *French v. Birmingham*, 165 Ala. 669, 51 So. 254; *Sullivan v. Oneida*, 61 Ill. 242; *State v. McIntyre*, 139 N. C. 599, 52 S. E. 63; *State v. Williams*, 146 N. C. 618, 61 S. E. 61, 14 Ann. Cas. 562, 17 L. R. A., N. S., 299; *State v. Gilman*, 33 W. Va. 146, 10 S. E. 283, 6 L. R. A. 847; *Cooley on Constitutional Lim.* 549; *Black on Intoxicating Liquors*, p. 50, sec. 38.)

Argument by *Amicus Curiae*.

There is a limit to the police power which the court must, when called upon in a judicial proceeding, ascertain and declare. (*State v. Redmon*, 134 Wis. 89, 126 Am. St. 1003, 114 N. W. 137, 15 Ann. Cas. 408, 14 L. R. A., N. S., 229; *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. ed. 205.)

F. L. Moore, Pros. Atty., for State.

Chapter 11 of the Idaho Session Laws of 1915 does not violate sec. 1 of the fourteenth amendment to the constitution of the U. S. (*Foster v. State of Kansas*, 112 U. S. 201, 205, 5 Sup. Ct. 8, 97, 28 L. ed. 629, and notes; *License Cases*, *Thurlow v. Massachusetts*, 5 How. (U. S.) 504, 12 L. ed. 256; *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. ed. 205; *Purity Extract & Tonic Co. v. Lynch*, 226 U. S. 192, 33 Sup. Ct. 44, 57 L. ed. 184; Webb-Kenyon Act, Fed. Stat. Ann. Sup. 1914, p. 208.)

The possession of property may be made a crime by the state legislature. (*Luck v. Sears*, 29 Or. 421, 54 Am. St. 804, 44 Pac. 693, 32 L. R. A. 738, and cases cited; *People of New York ex rel. Sütz v. Hesterberg*, 211 U. S. 31, 29 Sup. Ct. 10, 53 L. ed. 75; *Magner v. People*, 97 Ill. 320; *Purity Extract & Tonic Co. v. Lynch*, *supra*; *Rosenthal v. People*, 226 U. S. 260, Ann. Cas. 1914B, 71, 33 Sup. Ct. 27, 57 L. ed. 212; *State v. Lewis*, 134 Ind. 250, 33 N. E. 1024, 20 L. R. A. 52; *State v. Randolph*, 1 Mo. App. 15; *Phelps v. Racey*, 60 N. Y. 10, 19 Am. Rep. 140; *State v. Kenney* (Wash.), 145 Pac. 450; *Ah Lim v. Territory*, 1 Wash. 156, 24 Pac. 588, 9 L. R. A. 395.)

H. H. Taylor, *Amicus Curiae*.

With regard to the right of the legislature to impose further prohibitions upon territory that has become dry by a vote of the people, see *Atkinson v. Southern Express Co.*, 94 S. C. 444, 78 S. E. 516, 48 L. R. A., N. S., 349.

The argument as to harrowing instances of the possibility of this act is met by the language of *Ex parte McClain*, 134 Cal. 110, 86 Am. St. 243, 66 Pac. 69, 54 L. R. A. 779.

Argument by *Amici Curiae*.

The legislature may provide against the use of liquor as a beverage except on the prescription of a duly qualified physician. (*State v. Osmers*, 21 Ida. 18, at 27, 120 Pac. 165.) It may prohibit the manufacture for personal use. (*Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. ed. 205.)

This act does not constitute class legislation; local option laws have been almost universally upheld, and such regulation does not constitute class or special legislation. (Vol. 1 *Woolen & Thornton*, sec. 155.)

The Kentucky constitution takes the case of *Commonwealth v. Campbell*, 133 Ky. 50, 117 S. W. 383, 19 Ann. Cas. 159, 24 L. R. A., N. S., 172, and other Kentucky cases, out of consideration in this case.

J. H. Peterson, Atty. Genl., E. G. Davis, Herbert Wing and T. C. Coffin, Assts., *Amici Curiae*.

The legislature, under the police power, has authority to punish the "guilty" possession of intoxicating liquors, meaning by "guilty" a possession for the purpose of violating the law; and if the possession is "innocent," meaning by "innocent" a possession such as is not contrary to the best interests of the public, and affects no one but the person having such possession, the legislature would have no authority whatever, under its police power, to interfere and make such possession a crime. (*Rupard v. State*, 7 Okl. Cr. 201, 122 Pac. 1108; *Southern Express Co. v. City of High Point*, 167 N. C. 103, 83 S. E. 254; *State v. Southern Express Co.* (N. C.), 83 S. E. 751; *Ex parte Hopkins* (Tex. Cr.), 171 S. W. 1163; *State v. Pope*, 79 S. C. 87, 60 S. E. 234; *Hunt v. State*, 5 Okl. Cr. 257, 114 Pac. 341; *Maynes v. State*, 6 Okl. Cr. 487, 119 Pac. 644; *Ex parte Peede* (Tex. Cr.), 170 S. W. 749; *Longmire v. State* (Tex. Cr.), 171 S. W. 1165; *Adams Express Co. v. Commonwealth*, 154 Ky. 462, 157 S. W. 908, 48 L. R. A., N. S., 342.)

If the court should see fit to construe the 1915 enactment as making only the "guilty" possession of intoxicating liquor unlawful, and as placing the burden upon the de-

Argument by *Amicus Curiae*.

fendant in all cases to show the innocence of his possession—in other words, that he has the liquor for a purpose which is protected under his constitutional guaranty—we believe that such a decision would find support in the universally accepted rule of evidence, stated by Jones on Evidence, 2d ed., sec. 181; *Caffee v. State* (Okl. Cr.), 148 Pac. 680; *Sellers v. State* (Okl. Cr.), 149 Pac. 1071.

The police power of a state does not extend to the deprivation of a citizen of the right to have intoxicating liquors in his possession for his own use. (*Town of Selma v. Brewer*, 9 Cal. App. 70, 98 Pac. 61; *Sullivan v. City of Oneida*, 61 Ill. 242; *City of Christopher v. Massotti*, 173 Ill. App. 241; *State v. Denton*, 164 N. C. 530, 80 S. E. 401; *State v. Lee*, 164 N. C. 533, 80 S. E. 405; *Huffman v. State*, 6 Okl. Cr. 476, 119 Pac. 644; *Bird v. State* (Tenn.), 175 S. W. 554; *Ex parte Brown*, 38 Tex. Cr. 295, 70 Am. St. 743, 42 S. W. 554; *State of West Virginia v. Adams Express Co.*, 219 Fed. 794.)

The title specifically limits the keeping or possession of liquor to the keeping for sale. The body of the act is broader than the title in this, that it prohibits the keeping for any purpose. If, however, the terms of the act in their construction are limited to a possession for an unlawful purpose, to wit, a possession for sale, then the body of the act is reconcilable with the impression gained from a reading of the title. (*Bird v. State* (Tenn.), 175 S. W. 554.)

H. S. Kessler, *Amicus Curiae*.

It is clearly within the province of the legislature to place upon the defendant in a criminal action the burden of proving his lawful possession of intoxicating liquors. (*State v. Adams*, 22 Ida. 485, 126 Pac. 401; *State v. Barrett*, 138 N. C. 630, 50 S. E. 506, 1 L. R. A., N. S., 626; *Caffee v. State* (Okl. Cr.), 148 Pac. 680.)

The prohibition of possession of intoxicating liquors is not unconstitutional when it is resorted to as an incident or means for successfully enforcing prohibitory laws. The demands of society have been gradually extending the police power of the state by making so-called individual rights subservient

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to public needs and demands. (*Noble State Bank v. Haskell*, 219 U. S. 104, Ann. Cas. 1912A, 487, 31 Sup. Ct. 186, 55 L. ed. 112, 32 L. R. A., N. S., 1062; *State v. Fargo Bottling Works Co.*, 19 N. D. 396, 124 N. W. 387, 26 L. R. A., N. S., 872; *Pennell v. State*, 141 Wis. 35, 123 N. W. 115; *Commonwealth v. Henry*, 110 Va. 879, 65 S. E. 570, 26 L. R. A., N. S., 883; *United States v. Oregon-Washington Ry. & Nav. Co.*, 210 Fed. 378; *Cureton v. State*, 135 Ga. 660, 70 S. E. 332, 49 L. R. A., N. S., 182; *Motlow v. State*, 125 Tenn. 547, 145 S. W. 177; *Atkinson v. Southern Express Co.*, 94 S. C. 444, 78 S. E. 516, 48 L. R. A., N. S., 349; *Ex parte Muse* (Tex. Cr.), 168 S. W. 520; *Johnson v. State* (Tex. Cr.), 171 S. W. 211; *State v. Phillips* (Miss.), 67 So. 651.)

Under the Arizona statute the having of liquor of any kind for any purpose is unlawful, and yet the court upheld the statute. (*Gherna v. State* (Ariz.), 146 Pac. 494.)

"The decisions very generally unite in holding that any law for the control of the liquor traffic which applies to all persons in a locality is constitutional, and the state may make that locality of whatever character it wishes; it does not matter whether it is a regular political division of the state, or a municipal corporation, or a district fixed arbitrarily by the law." (*People v. Brady*, 262 Ill. 578, 105 N. E. 1; *Martens v. Brady*, 264 Ill. 178, 106 N. E. 266; *Ex parte Francis* (Tex. Cr.), 165 S. W. 147; *State v. Ure*, 91 Neb. 31, 135 N. W. 224; *People v. Hoffman*, 116 Ill. 587, 56 Am. Rep. 793, 5 N. E. 596; *State v. Richardson*, 48 Or. 309, 85 Pac. 225, 8 L. R. A., N. S., 362; *Mix v. Board of Commrs.*, 18 Ida. 695, 112 Pac. 215, 32 L. R. A., N. S., 534.)

Cleve Groome, *Amicus Curiae*.

The law interferes with other legitimate and valuable property rights which a citizen may have, in the exercise of lawful occupations and industry. In the manufacture of cider vinegar, there is a certain stage during the process of manufacture when the sweet cider goes through a period of fermentation and reaches a stage commonly known as hard cider. At this stage of the manufacture of this article of commerce,

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this item of property, the citizen who may be engaged in this occupation is guilty of a crime because he has in his possession intoxicating liquors.

"Each law of the kind involves the questions: First, is there a threatened danger? Second, does the regulation invade a constitutional right? Third, is the regulation reasonable?" (*People v. Smith*, 108 Mich. 527, 62 Am. St. 715, 66 N. W. 382, 32 L. R. A. 853; *In re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636.)

Sec. 19, art. 3, of the constitution provides that the legislature shall not pass local or special laws in certain enumerated cases, one of which is for the punishment of crimes and misdemeanors. By this act the legislature has attempted to make an act a crime, for instance, in Canyon county, which is not a crime in some of the other counties of the state, for instance, Ada county. (*Bear Lake County v. Budge*, 9 Ida. 703, 108 Am. St. 179, 75 Pac. 614; *Butler v. City of Lewiston*, 11 Ida. 393, 83 Pac. 234; *Lewis' Sutherland*, Stat. Const., 2d ed., sec. 197; *Northern Pac. Ry. Co. v. Barnes*, 2 N. D. 310, 51 N. W. 386; *State v. Nelson*, 52 Ohio St. 88, 39 N. E. 22, 26 L. R. A. 317; *Lippman v. People*, 175 Ill. 101, 51 N. E. 872; *Budd v. Hancock*, 66 N. J. L. 133, 48 Atl. 1023; *State v. Cooley*, 56 Minn. 540, 58 N. W. 150; *Rodge v. Kelly*, 88 Miss. 209, 117 Am. St. 733, 40 So. 552, 11 L. R. A., N. S., 635; *Harper v. Galloway*, 58 Fla. 255, 51 So. 226, 19 Ann. Cas. 235, 26 L. R. A., N. S., 794; *Board of Education v. Alliance Assur. Co.*, 159 Fed. 994.)

The act is unconstitutional in that there are subjects contained in said law which are not expressed in the title to the act.

In examining the title we find therein reference to the matter of keeping for sale or gift, but such title does not refer to, nor in any way contain, any mention of the proposition of keeping in his possession, or having in his possession. Neither does the title make any reference to the provision providing that mere possession of the United States internal revenue tax stamp or receipt shall be *prima facie* evidence of the sale of intoxicating liquors. (*Turner v.*

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Coffin, 9 Ida. 338, 74 Pac. 962; *Katz v. Herrick*, 12 Ida. 1, 86 Pac. 873; *Gerding v. Board of County Commrs.*, 13 Ida. 444, 90 Pac. 357; *Hailey v. State Historical Soc.*, 25 Ida. 165, 136 Pac. 212; *Keller v. State* (Tex. Cr.), 87 S. W. 669, 1 L. R. A., N. S., 489.)

PER CURIAM.—The petitioner, Ed Crane, was arrested upon the charge of having intoxicating liquor in his possession in Latah county and upon preliminary examination had before a magistrate was held to answer said charge in the district court, and in default of bail was committed to the custody of the sheriff. This proceeding was commenced by filing a petition for a writ of *habeas corpus* to procure his release from custody.

The agreed facts necessary to a determination of the questions of law here presented are that on the 16th day of May, 1915, the petitioner had in his possession in Latah county a quantity of whisky for his own use and not for the purpose of selling it or of giving it away; that Latah county now is and on May 16, 1915, was a prohibition district within the meaning of secs. 2, 15 and 22 of chap. 11 (p. 41), Sess. Laws, 1915, which sections are as follows:

“Sec. 2. It shall be unlawful for any person, firm, company, or corporation, its officers or agents, to sell, manufacture or dispose of any intoxicating liquor or alcohol of any kind within a prohibition district or to have in his or its possession or to transport any intoxicating liquor or alcohol within a prohibition district unless the same was procured and is so possessed and transported under a permit as hereinafter provided: provided, that so long as the manufacture of intoxicating liquors for beverage purposes shall not be prohibited within the State by the Constitution or by general law applicable by its terms to the State as a whole it shall not be unlawful for any person, company, or corporation to manufacture intoxicating liquors for beverage purposes in a prohibition district for transportation to and sale outside of a prohibition district: provided, that nothing in this Act

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shall be construed to apply to the manufacture, transportation or sale of wood or denatured alcohol."

"Sec. 15. It shall be unlawful for any person, to import, ship, sell, transport, deliver, receive or have in his possession any intoxicating liquors except as in this Act provided."

"Sec. 22. It shall be unlawful for any person, firm, company, corporation or agent to have in his or its possession any intoxicating liquors of any kind for any use or purpose except the same shall have been obtained and is so possessed under a permit authorized by this Act."

The only means provided by the act for procuring intoxicating liquors in a prohibition district for any purpose relates to wine to be used for sacramental purposes and pure alcohol to be used for scientific or mechanical purposes, or for compounding or preparing medicine, so that the possession of whisky, or of any intoxicating liquor, other than wine and pure alcohol for the uses above-mentioned, is prohibited.

One of the contentions made upon behalf of petitioner is that the sections quoted are in contravention of sec. 1 of the 14th amendment to the constitution of the United States, and also of sec. 13, art. 1 of the constitution of Idaho, and that the act in question is not a reasonable exercise of the police power of the state and is void. Sec. 1 of the 14th amendment to the constitution of the United States is as follows:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Sec. 13 of art. 1 of the constitution of Idaho provides, among other things: "No person shall . . . be deprived of life, liberty or property without due process of law."

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No fixed rule has been discovered by which to determine whether or not a statute of the nature of the one under consideration is a proper exercise of the police power, but it may be said the questions propounded to the courts are: Does the statute purport to have been enacted to protect the public health, the public morals, or the public safety? Has it a real and substantial relation to those objects, or is it, upon the other hand, a palpable invasion of rights secured by the constitution? Questions as to the wisdom and expediency of such legislation address themselves to the legislative, not to the judicial branch of the government.

In the case of *Ah Lim v. Territory*, 1 Wash. 156, 24 Pac. 588, 9 L. R. A. 395, Mr. Justice Dunbar, quoting from *Williams v. Cammack*, 27 Miss. 209, 61 Am. Dec. 508, said: "The legislative power 'may be unwisely exercised or abused, yet it is a power entrusted by the constitution to the legislature, which, while exercised within the scope of the grant, is subject alone to their discretion; with which the judicial tribunals have no right to interfere because, in their judgment, the action of the legislature is contrary to the principles of natural justice.' " (See, also, *State v. Lewis*, 134 Ind. 250, 33 N. E. 1024, 20 L. R. A. 52; *People of State of New York ex rel. Silz v. Hesterberg*, 211 U. S. 31, 29 Sup. Ct. 10, 53 L. ed. 75.)

Mr. Justice Hughes in delivering the opinion of the supreme court of the United States in case of *Purity Extract & Tonic Co. v. Lynch*, 226 U. S. 192, 33 Sup. Ct. 44, 57 L. ed. 184, said: "That the state, in exercise of its police power, may prohibit the selling of intoxicating liquors, is undoubted. . . . It is also well established that, when a state exerting its recognized authority, undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end as it may deem necessary in order to make its action effective. It does not follow that because a transaction, separately considered, is innocuous, it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the government.

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. . . . With the wisdom of the exercise of that judgment the court has no concern; and unless it clearly appears that the enactment has no substantial relation to a proper purpose, it cannot be said that the limit of legislative power has been transcended. To hold otherwise would be to substitute judicial opinion of expediency for the will of the legislature,—a notion foreign to our constitutional system.”

Mr. Justice Harlan, delivering the opinion of the court in case of *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. ed. 205, said:

“It is, however, contended, that, although the state may prohibit the manufacture of intoxicating liquors for sale or barter within her limits, for general use as a beverage, ‘no convention or legislature has the right, under our form of government, to prohibit any citizen from manufacturing for his own use, or for export, or storage, any article of food or drink not endangering or affecting the rights of others.’ The argument made in support of the first branch of this proposition, briefly stated, is that in the implied compact between the state and the citizen certain rights are reserved by the latter, which are guaranteed by the constitutional provision protecting persons against being deprived of life, liberty or property, without due process of law, and with which the state cannot interfere; that among those rights is that of manufacturing for one’s use either food or drink; and that while, according to the doctrines of the commune, the state may control the tastes, appetites, habits, dress, food, and drink of the people, our system of government, based upon the individuality and intelligence of the citizen, does not claim to control him, except as to his conduct to others, leaving him the sole judge as to all that only affects himself.

“It will be observed that the proposition, and the argument made in support of it, equally concede that the right to manufacture drink for one’s personal use is subject to the condition that such manufacture does not endanger or affect the rights of others. If such manufacture does prejudicially affect the rights and interests of the community, it follows, from the very premises stated, that society has the power to

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protect itself, by legislation, against the injurious consequences of that business. As was said in *Munn v. Illinois*, 94 U. S. 113, 124, 24 L. ed. 77, 84, while power does not exist with the whole people to control rights that are purely and exclusively private, government may require 'each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another.'

"But by whom, or by what authority, is it to be determined whether the manufacture of particular articles of drink either for general use or for the personal use of the maker, will injuriously affect the public? Power to determine such questions, so as to bind all, must exist somewhere; else society will be at the mercy of the few, who, regarding only their own appetites or passions, may be willing to imperil the peace and security of the many, provided only they are permitted to do as they please. Under our system that power is lodged with the legislative branch of the government. It belongs to that department to exert what are known as the police powers of the state, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health or the public safety.

"It does not at all follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as a legitimate exertion of the police powers of the state. There are, of necessity, limits beyond which legislation cannot rightfully go. While every possible presumption is to be indulged in favor of the validity of the statute, *Sinking Fund Cases*, 99 U. S. 700, 718, 25 L. ed. 496, 501, the courts must obey the constitution rather than the law-making department of government, and must, upon their own responsibility, determine whether, in any particular case, these limits have been passed. 'To what purpose,' it was said in *Marbury v. Madison*, 5 U. S. (1 Cranch.) 137, 167, 2 L. ed. 60, 70, 'are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons

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on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation.' The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution.

“Keeping in view these principles, as governing the relations of the judicial and legislative departments of government with each other, it is difficult to perceive any ground for the judiciary to declare that the prohibition by Kansas of the manufacture or sale, within her limits, of intoxicating liquors for general use there as a beverage, is not fairly adapted to the end of protecting the community against the evils which confessedly result from the excessive use of ardent spirits. There is no justification for holding that the state, under the guise merely of police regulations, is here aiming to deprive the citizen of his constitutional rights; for we cannot shut out of view the fact, within the knowledge of all, that the public health, the public morals, and the public safety, may be endangered by the general use of intoxicating drinks; nor the fact established by statistics accessible to everyone, that the idleness, disorder, pauperism and crime existing in the country are, in some degree at least, traceable to this evil. If, therefore, a state deems the absolute prohibition of the manufacture and sale, within her limits, of intoxicating liquors for other than medical, scientific and manufacturing purposes, to be necessary to the peace and security of society, the courts cannot without usurping legislative functions, override the will of the people as thus expressed by their chosen representatives. They have nothing to do with the mere policy of legislation. Indeed, it is a fundamental principle in our institutions, indispensable to

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the preservation of public liberty, that one of the separate departments of government shall not usurp powers committed by the constitution to another department. And so, if, in the judgment of the legislature, the manufacture of intoxicating liquors for the maker's own use, as a beverage, would tend to cripple, if it did not defeat, the efforts to guard the community against the evils attending the excessive use of such liquors, it is not for the courts, upon their views as to what is best and safest for the community, to disregard the legislative determination of that question. So far from such a regulation having no relation to the general end sought to be accomplished, the entire scheme of prohibition, as embodied in the constitution and laws of Kansas, might fail, if the right of each citizen to manufacture intoxicating liquors for his own use as a beverage were recognized. Such a right does not inhere in citizenship. Nor can it be said that government interferes with or impairs anyone's constitutional rights of liberty or of property, when it determines that the manufacture and sale of intoxicating drinks, for general or individual use, as a beverage, are, or may become, hurtful to society, and constitute, therefore, a business in which no one may lawfully engage. Those rights are best secured, in our government, by the observance, upon the part of all, of such regulations as are established by competent authority to promote the common good. No one may rightfully do that which the law-making power, upon reasonable grounds, declares to be prejudicial to the general welfare.

“This conclusion is unavoidable, unless the fourteenth amendment of the constitution takes from the states of the Union those powers of police that were reserved at the time the original constitution was adopted. But this court has declared, upon full consideration, in *Barbier v. Connolly*, 113 U. S. 27, 31, 5 Sup. Ct. 357, 28 L. ed. 923, that the fourteenth amendment has no such effect. After observing, among other things, that that amendment forbade the arbitrary deprivation of life or liberty, and the arbitrary spoliation of property, and secured equal protection to all under like circumstances, in respect as well to their personal and civil rights

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as to their acquisition and enjoyment of property, the court said: 'But neither the amendment—broad and comprehensive as it is—nor any other amendment was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity.' "

An examination of the opinion expressing a contrary view will disclose more of argument against the wisdom of such legislation as this than of reason why the aid of the courts may be invoked to defeat it.

The court of criminal appeals of Oklahoma in *Ex parte Wilson*, 6 Okl. Cr. 451, 119 Pac. 596, deciding that an act of the legislature making it unlawful for any person to have or keep in excess of one quart of intoxicating liquor is unconstitutional, quotes from a number of decisions wherein statutes similar in some respects to the act here under consideration have been held to be void, because not a reasonable exercise of the police power and in conflict with sec. 1 of the 14th amendment of the constitution of the United States and with constitutional provisions similar to our sec. 13, art. 1. Quoting with approval from *Commonwealth v. Campbell*, 133 Ky. 50, 117 S. W. 383, 19 Ann. Cas. 159, 24 L. R. A., N. S., 172, it says:

"It will not require any elucidation to show that, if the citizen may be prohibited from having liquor in his possession, he can be prohibited from drinking it, because, of necessity, no one can drink that which he has not in his possession. So that if it is competent for the legislative body of any given city or district, or even the legislature of the state, to prohibit the citizen from having liquor in his possession, then a new and more complete way has been discovered for the establishment of total prohibition, not only in any precinct, town, or county, but throughout the state, because, if it is competent to prohibit the citizen from having liquor in his possession, it necessarily follows that he can neither sell nor use it, as

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it is a physical impossibility to do either without first having had the possession of the interdicted liquor."

The same opinion contains the following quotation from the case of *State v. Gilman*, 33 W. Va. 146, 10 S. E. 283, 6 L. R. A. 847;

"The keeping of liquors in his possession by a person, whether for himself or for another, unless he does so for the illegal sale of it, or for some other improper purpose, can by no possibility injure or affect the health, morals or safety of the public; and, therefore, the statute prohibiting such keeping in possession is not a legitimate exertion of the police power. It is an abridgment of the privileges and immunities of the citizen without any legal justification, and therefore void." (See, also, *State v. Williams*, 146 N. C. 618, 61 S. E. 61, 14 Ann. Cas. 562, 17 L. R. A., N. S., 299.)

Probably the author of none of these opinions would hesitate in holding that the sale of intoxicating liquor may be prohibited as a legitimate exercise of the police power and that such a law would not abridge any of the privileges or immunities of the citizens in such a way as to violate any constitutional provision. Still it must be admitted that if the possession of such liquor "can by no possibility injure or affect the health, morals or safety of the public," the sale is equally harmless, for it only transfers the possession from one person to another. The fact is, that the harm consists neither in the possession nor sale, but in the consumption of it. That is the evil which the people of Idaho, acting through the legislature, are trying to eradicate and since "it will not require any elucidation to show that, if the citizen may be prohibited from having liquor in his possession, he can be prohibited from drinking it, because, of necessity, no one can drink that which he has not in his possession," and since great difficulty has been encountered in enforcing the prohibitory laws, the statement made by the learned jurist in the case of *Mugler v. Kansas*, *supra*, relative to the manufacture of intoxicating liquors for the maker's own use, as a beverage, might well be repeated with respect to its possession, which would make it read:

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“And so, if, in the judgment of the legislature, the possession of intoxicating liquors would tend to cripple, if it did not defeat, the effort to guard the community against the evils attending the excessive use of such liquors, it is not for the courts, upon their views as to what is best and safest for the community, to disregard the legislative determination of that question.”

We have reached the conclusion that this act is not in contravention of sec. 1 of the 14th amendment to the constitution of the United States, nor of sec. 13, art. 1, of the constitution of Idaho, that it was passed by the legislature with a view to the protection of the public health, the public morals and the public safety; that it has a real and substantial relation to those objects, and that it is, therefore, a reasonable exercise of the police power of the state.

It is next contended that there are subjects contained in the act under consideration which are not expressed in the title. Therefore, such portions of the act which are not expressed in the title are unconstitutional and void under art. 3, sec. 16, of the constitution. Said section provides that “Every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title; but if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be embraced in the title.”

The title of the act is as follows: “Defining prohibition districts and regulating and prohibiting the manufacture, sale, keeping for sale, transportation for sale or gift, and traffic in intoxicating liquors and prohibiting drinking and drunkenness in public places in such prohibition districts, and fixing fines and penalties, and repealing chapter 27 and chapter 99 of the Session Laws of 1913.”

The objection urged to the sufficiency of the title is based upon the omission in the title of any reference to that portion of the act which prohibits “any person, firm or corporation or agent to have in his or its possession any intoxicating liquors of any kind for any use or purpose, except the same

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shall have been obtained and is so possessed under a permit authorized by this act"; also the failure of the title to refer to that portion of the act which provides that "The issuance by the United States of an Internal Revenue Special Tax Stamp or Receipt to any person as a dealer in intoxicating liquors shall be *prima facie* evidence of the sale of intoxicating liquors by such person during the time the stamp or receipt is in force and effect.

"A copy of such Stamp or Receipt or of the record of the issuance thereof, certified to by a United States Internal Revenue officer having charge of such record is admissible as evidence in like case and with like effect as the original Stamp or Receipt."

Necessarily the title of an act must be brief. The object of the title is to give a general statement of the subject matter, and such a general statement will be sufficient to include all provisions of the act having a reasonable connection with the subject matter mentioned and a reasonable tendency to accomplish the purpose of the act. The object of the title is not to state the reason for the passage of the act, or to give an index to its contents, but to give a general statement of the subject matter of the act. (*Tarantina v. Louisville & N. R. R. Co.*, 254 Ill. 624, Ann. Cas. 1913B, 1058, 98 N. E. 999.) As was stated in case of *State v. Pioneer Nurseries Co.*, 26 Ida. 332, 143 Pac. 405, and other cases therein cited, "the title . . . is sufficient if the act treats of but one general subject and that subject is expressed in the title."

The act under consideration treats of but one general subject, namely, to limit the use of intoxicating liquors. There is nothing contained in the act that is not germane to the general subject or purpose expressed in the title. (*Pioneer Irr. Dist. v. Bradley*, 8 Ida. 310, 101 Am. St. 201, 68 Pac. 295; *Montclair Township v. Ramsdell*, 107 U. S. 147, 2 Sup. Ct. 391, 27 L. ed. 431.)

In *People v. Parks*, 58 Cal. 624, it is said: "Provisions of an act may be numerous; but however numerous, if they can

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be, by fair intendment, considered as falling within the subject matter of legislation, *or necessary as ends and means to the attainment of the subject*, the act will not conflict with the constitution." Each and every part of the act in question comes within the subject matter of legislation, and is necessary as ends and means to the attainment of the object to protect the health, morals and promote the general welfare of the citizens of the state by the suppression of the unrestricted use of intoxicating liquors.

The object or purpose of the clause in the constitution above quoted is to prevent, as has been frequently stated in the opinions of this court, the combining of incongruous matters and objects totally distinct, and having no connection nor relation with each other; to guard against "log rolling" legislation; and to prevent the perpetration of fraud upon the members of the legislature or the citizens of the state, in the enactment of laws. The history of the various sessions of the legislature of this state in dealing with the liquor question, and leading up to the passage of the act in question, conclusively precludes the idea that there was any fraud connected with the enactment of the statute under consideration. The unanimity of the legislature in the passage of the act under consideration is sufficient evidence of the fact that they acted with full knowledge of the contents of the bill, and understood the consequences of their act in so far as they were concerned.

It is a well-established rule that where there is a doubt whether the subject of the act is sufficiently expressed in its title, the doubt should be resolved in favor of the validity of the act. Even though we were in doubt as to the sufficiency of the title under consideration, we are admonished, in case of *State v. Pioneer Nurseries Co.*, *supra*, to resolve that doubt in favor of the validity of the act. There is, however, no doubt in our minds as to the sufficiency of the title.

It is next insisted that the act in question is local and special; therefore, in conflict with sec. 19, art. 3, of the constitution, which provides that "The legislature shall not pass local or special laws in any of the following enumerated cases,

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that is to say: For the punishment of crimes and misdemeanors. . . . ”

It is contended by some of the many friends of the court who appeared as counsel in this case that the statute is local and special legislation, for the reason that it makes an act a crime in prohibition territory which is not a crime in wet territory; and, therefore, said statute is not a declaration of a state policy, but is applicable only to counties that have adopted the local option law. However, it will be observed that the statute is applicable to every county in the state alike.

It is true that the act under discussion may have local application, but it is nevertheless a general law, as it applies to all of the counties in the state alike whenever the electors of any county or the county commissioners thereof, or the municipal authorities of any incorporated city or village, conclude to avail themselves of its provisions.

In *Collier v. Cassady*, 63 Fla. 390, 57 So. 617, it was said that a law is a general law which is potentially applicable to every county in the state, though at the time of its passage it applies to but some of the counties.

In *Clark v. Finley*, 93 Tex. 171, 54 S. W. 343, 345, the rule was enunciated that a local statute is one which relates to a particular person or particular thing of a class. And in *State v. California Min. Co.*, 15 Nev. 234, it was said that a special law is one which applies only to an individual or to a number of individuals selected out of the class to which they belong, or to a special locality.

In *People v. Hoffman*, 116 Ill. 587, 56 Am. Rep. 793, 5 N. E. 596, 8 N. E. 788, it was said: “Whether laws are general or not, does not depend upon the number of those within the scope of their operation. They are general, ‘not because they operate upon every person in the state, for they do not, but because every person, who is brought within the relations and circumstances provided for, is affected by the laws.’ Nor is it necessary, in order to make a statute general, that ‘it should be equally applicable to all parts of the state. It is sufficient if it extends to all persons doing or omitting to do an act within the territorial limits described in the statute.’ ”

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This court in case of *Mix v. Board of County Commissioners*, 18 Ida. 695, 706, 112 Pac. 215, 32 L. R. A., N. S., 534, announced the following doctrine: "The local option law is of general application to every county in the state. While it is left with the people of each county to say whether it shall be enforced in the county, that fact does not make it any the less a general law under its terms and provisions the electors of each county have a right to vote upon the question whether the sale or disposal of intoxicating liquors as a beverage shall be prohibited in such county. Every county in the state may accept or reject it upon the same terms and conditions. It is clearly a 'general law' within the meaning of that phrase as defined by the leading law-writers, and the courts of last resort of the nation. . . . "

It has been argued that this law prohibits the use of alcohol by physicians and surgeons in the practice of their professions; that it is unnecessarily stringent and is, therefore, not a proper police regulation. The act expressly provides for the purchase and possession of pure alcohol to be used for scientific purposes. While it is not contended in this case that petitioner had possession of the liquor for scientific purposes and while the liquor was not alcohol, but whisky, so that this question may properly have no bearing upon the decision of this case, however, in order to set the minds of the citizens of the state forever at rest upon this point, we will say that the practice of medicine, surgery, dentistry and dental surgery are sciences, and that pure alcohol may be lawfully procured under the terms of this act in the manner provided therein for use in the practice of these professions, or by any person, citizen or hospital for any scientific or medicinal purpose. Webster defines the word "medicine," used in the sense of the practice of medicine, as follows: "The science and art of dealing with the prevention, cure, or alleviation of disease."

Quoting from the case of *United States v. Massachusetts Gen'l Hospital*, 100 Fed. 932, 938, 7 Words & Phrases Judicially Defined, 6350, refers to the word "science" as applied to surgery, as follows: "In the use of the word 'science,' it

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cannot be denied that practical surgery is ordinarily thus spoken of. Webster's Dictionary describes surgery as a 'branch of medical science.' "

Since the act provides for the possession of pure alcohol to be used for scientific purposes, those who procure it in conformity to the provisions of the law in order to legitimately make use of it for any scientific purpose will not thereby have violated the law.

It has also been argued that this act cannot become effective in local option districts other than those created since its adoption. We have reached a conclusion to the contrary. Section 1 expresses the legislative intent upon this point as follows:

"Sec. 1. A prohibition district within the meaning of this Act and all other acts regulating or prohibiting the traffic in intoxicating liquors shall be any county or incorporated city or village wherein the manufacture, sale, possession, keeping for sale, transportation for sale or gift of intoxicating liquors for beverage purposes is declared unlawful, whether such prohibition district be established by constitutional amendment, legislative enactment, adoption of the provisions of the local option law or by refusal of municipal authorities or county commissioners to grant saloon licenses."

A number of counties of Idaho became prohibition districts at a time prior to the enactment of the law under consideration, pursuant to the provisions of an act of the legislature approved February 20, 1909, Sess. Laws, 1909, page 9, which is our original local option law, and which provides that counties may by vote determine whether or not the sale or disposal of intoxicating liquors as a beverage shall be prohibited.

It is quite possible that in some of these counties, at least, had that question been submitted to them the electors would have voted to reject the provisions of chapter 11 of the Session Laws, 1915, which make the mere possession of such liquors, in and of itself, a crime. We have reached the conclusion that it is unnecessary to submit the question of the

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adoption or rejection of the provisions of this law to the electors of prohibition districts created prior to its adoption.

It is said by Mr. Justice McCord in the case of *Fitch v. State*, 58 Tex. Cr. 366, 127 S. W. 1040, wherein is digested a large number of decisions upon this subject: "If an element should invade local option territory opposed to the enforcement of local option laws and should throw its force against the will of the people and by its craft and cunning devise schemes and means to defeat the purpose of the law and invent a method whereby, through the forms of law, they should evade the crime that had been defined by the legislature, it would be a monstrous doctrine to hold that the legislature is powerless to enact legislation defining offenses and prescribing penalties for the new conditions that may arise because the same was not an offense at the time that local option was adopted." Further, quoting from the case of *Dupree v. State*, 102 Tex. 455, 119 S. W. 301, he said: "The purpose of the prohibition is to prevent the thing prohibited. . . . Prevention of crime is one of the objects to which the most anxious thoughts and the most constant efforts of thoughtful legislators are directed, and the dealing with the steps preparatory to commission is a favorite method. Our codes are full of instances of this, too numerous and too familiar to need citation." Continuing the opinion in the *Fitch* case it is said: "We, therefore, hold that the act of the thirty-first legislature making it a penitentiary offense to engage in the business of occupation of selling intoxicating liquors in local option territory is a valid law; that the same applies to territory that had previous to the enacting of said law adopted local option, and that the adoption of local option laws by the people does not withdraw that territory from legislative control to pass all needful legislation to make the local option laws effective, and to see that the will of the people is carried out."

While this court holds that the act under consideration is applicable to all prohibition districts within the state of Idaho, whether they became such before or since its adoption, were it otherwise the argument in favor of restricting its

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application to those districts of later origin would not avail the petitioner. This court takes judicial notice that the county of Latah is a prohibition district by reason of the refusal of its board of county commissioners to grant liquor licenses and that no local option election has ever been held therein. Since the enactment of the law here under consideration no liquor license has been granted in that county, and it is, therefore, a prohibition district in contemplation of chapter 11 of the Sess. Laws, 1915, made and continued such by its board of county commissioners since the enactment of that chapter. Counsel for the petitioner and the prosecuting attorney have stipulated, upon this point, as follows: "That Latah county, is now, and was at all times herein mentioned, a prohibition district within the meaning of the act referred to, chapter 11 of the Session Laws of 1915 of the state of Idaho."

By the provisions of chapter 28, Sess. Laws 1915, the entire state of Idaho is constituted a prohibition district and said chapter is made effective on and after January 1, 1916, upon and after which date the provisions of chapter 11, Sess. Laws 1915, will apply to the state at large; in the meantime it is effective in all prohibition districts within the state, whether created before or after its adoption and whether created by constitutional amendment, legislative enactment, adoption of the provisions of the local option law or by the refusal of municipal authorities or county commissioners to grant saloon licenses.

The writ of *habeas corpus* is quashed, and the petitioner is remanded to the custody of the sheriff.

Points Decided.

(September 17, 1915.)

IDAHO-IOWA LATERAL & RESERVOIR COMPANY,
LIMITED, a Corporation, Appellant, v. C. C.
FISHER, Respondent.

[151 Pac. 998.]

EMINENT DOMAIN—RIGHT TO EXERCISE—RESERVOIRS AND DAMS—CONSTITUTIONAL AND STATUTORY CONSTRUCTION—CONDEMNATION—STATE LANDS—PUBLIC USE—EASEMENT—FEE-SIMPLE TITLE—PROCEDURE TO CONDEMN—LEGISLATURE MAY REGULATE.

1. Under the provisions of an act approved March 18, 1901, (Sess. Laws 1901, p. 191), a person or persons desiring to construct a ditch, canal, reservoir or other works for carrying or distributing public water for any beneficial use over or upon lands owned or controlled by the state are granted the right of way for the same upon a compliance with the provisions of said act.

2. Sec. 8, art. 9, of the state constitution provides that no school lands shall be sold for less than \$10 an acre, which lands must be sold at public auction. Said provisions contemplate that the fee-simple title shall be sold for not less than \$10 per acre and must be sold at public auction.

3. Under the provisions of sec. 14, art. 1 of the state constitution, the necessary use of lands for the construction of reservoirs or storage basins for the purpose of irrigation is declared to be a public use and subject to the regulation and control of the state.

4. The granting by the state of an easement for a reservoir on school lands under the provisions of said sec. 14, art 1, is not such a sale or disposal of the land as is contemplated by the Admission Act admitting Idaho into the Union of states, nor as contemplated by sec. 8 of art. 9 of the state constitution, and does not convey the legal title to the land; but leaves the fee-simple title in the state.

5. Under the classification of estates and rights in lands subject to be taken for public use as provided by sec. 5211, Rev. Codes, the fee-simple title may be taken for reservoirs and dams and for permanent flooding occasioned thereby. By that classification it was not intended to compel the condemnor to take the title in fee simple, but was intended that the compensation for the land should not be reduced simply because an easement was taken or given rather than a fee-simple title.

Argument for Appellant.

6. Under the provisions of said sec. 14 of the constitution it was not intended that, by the subjection of state lands to certain public uses, the title in fee should pass to the condemnor under the eminent domain statutes.

7. When Idaho became a state it had and assumed the power of eminent domain as one of the inalienable rights of its sovereignty, and Congress, when it admitted Idaho into the Union and provided that all school lands granted to the state should not be sold for less than \$10 per acre, did not intend to deprive the state of the power of eminent domain. And the state may exercise such right over all state lands, and may grant, in such manner as the legislature may provide, easements for all of the public uses mentioned in said sec. 14, art. 1 of the state constitution.

8. The necessary use of lands for the construction of reservoirs over state lands is subject to the regulation and control of the state.

APPEAL from the District Court of the Third Judicial District for Ada County. Hon. Chas. P. McCarthy, Judge.

Action to quiet title to an easement of land for reservoir and dam purposes. Judgment in favor of defendant. *Reversed.*

Cavanah & Blake, for Appellant.

The plaintiff in this case contends that the grant of a right of way for a ditch, canal or reservoir, under sec. 14, art. 1 of the constitution, is not a sale or disposal of the lands, but simply the granting of an easement over the same, the legal title of which remains in the state.

"The right of travel over another's land may be denominated a right of way; it is an easement." (*Clawson v. Wallace*, 16 Utah, 300, 52 Pac. 9, 10; *Kripp v. Curtis*, 71 Cal. 62, 11 Pac. 879; *Oswald v. Wolf*, 126 Ill. 542, 19 N. E. 28, 30; *Clayton v. Chicago I. & D. Ry. Co.*, 67 Iowa, 238, 25 N. W. 150; *Appeal of Hoffman*, 118 Pa. 512, 12 Atl. 57; *Cairo V. & C. R. Co. v. Brevoort*, 62 Fed. 129, 25 L. R. A. 527.)

Sec. 14, art. 1, of the constitution is not limited or controlled in any way by the subsequent provisions of the constitution to the effect that school land shall not be sold for less than ten dollars per acre, and that no lands granted to the state by Congress shall be sold otherwise than at public auction.

Argument for Respondent.

In the case of *Imperial Irr. Co. v. Jayne*, 104 Tex. 395, Ann. Cas. 1914B, 322, 138 S. W. 575, decided by the supreme court of Texas, almost the identical point involved in this case was passed upon by the court. In the case of *Hollister v. State*, 9 Ida. 8, 71 Pac. 541, this court held that state land could be condemned under the statute relating to eminent domain.

J. H. Peterson, Atty. Genl., E. G. Davis, T. C. Coffin and Herbert Wing, Assts., for Respondent.

As to the issue properly before the court in *Tobey v. Bridgewood*, 22 Ida. 566, 127 Pac. 178, namely, the right of the legislature to provide for the alienation at private sale of the state's title to state land, we believe that reason and authority support the decision, but in asking for a reaffirmance of such a principle, we would not be understood as asking this court to reaffirm that decision *in toto*. If we are justified in assuming that the court there decided adversely to the right of the legislature to empower the land board to grant a right of way, a mere easement over state land for such public uses as ditches, canals, telegraph and telephone lines, electric transmission lines, roads and railroads; if we are justified in assuming that it was there decided that the courts had jurisdiction over state lands, in condemnation proceedings, but that such jurisdiction was limited to the extent that a decree could not be rendered for a less amount than ten dollars per acre, then, even though relying upon that decision as it affects the issues here presented, we urge that the *Bridgewood* decision went unwarrantably far under the facts presented, and decided questions of great public moment of which no adequate presentation was made to the court.

If by the right of eminent domain on state lands a title less than a fee simple is to be conveyed, and the prohibition against sales other than at public auction at a minimum price of ten dollars per acre applies only where a fee-simple title is to be conveyed, then these two sections of our constitution are reconciled, and both are effective.

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The prohibition contained in sec. 8, art. 9, and the right conferred by sec. 14, art. 1, were included in our constitution with the full and complete understanding on the part of the framers of that instrument that an easement, or right of way, over state lands did not operate to divest the state of its title to such lands. Proceedings of the Constitutional Convention, dealing with art. 9, sec. 8, pp. 649, 703, 730, 849 and 1450; affecting art. 1, sec. 14, 288, 1596, 1606.

SULLIVAN, C. J.—This action was brought by the plaintiff, a corporation, to quiet its title to 2.86 acres of the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of sec. 36, Twp. 3 N., Range 1, W. B. M., Ada county, excepting a certain part thereof which is described in the complaint by metes and bounds.

An answer and cross-complaint were filed by the defendant. The answer denied that plaintiff had any right, title or interest whatever in said land, and in the cross-complaint the defendant alleged that he was the owner of said land and entitled to the possession thereof.

Upon the issues thus made the cause was tried by the court without a jury and judgment was entered quieting the title to said land in the defendant. This appeal is from the judgment.

The following facts appear from the record:

The plaintiff is an irrigation company and filed on the land in question as a reservoir site under the provisions of an act of the legislature approved March 18, 1901 (Sess. Laws 1901, p. 191). By sec. 8 of said act it was provided that any person or persons desiring to construct a ditch, canal or reservoir would be allowed a right of way by filing in the office of the state engineer a map showing the location of the land desired for such purpose, without paying any compensation therefor. Plaintiff's filing for said land was made on September 21, 1903, and the plans for the construction of the proposed reservoir of the plaintiff provide for the construction of three dams, one main dam and two minor ones. The main dam was constructed within five years after the date of filing by

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plaintiff and one of the minor dams was constructed some nine years after said filing, and the other minor dam has never been constructed.

The defendant's predecessor in interest purchased said land, together with other lands, from the state of Idaho on September 16, 1912, and the court in its finding of facts found that the plaintiff, the reservoir company, did not make application to the state board of land commissioners for the sale of said land; that no appraisal of said land was made, and that the land was not advertised or sold at public auction, and that plaintiff paid no consideration therefor to the state, and that the only things done by the plaintiff to procure the right to the use of said land was the filing of the map, plans and field-notes in the office of the state engineer and the construction work above mentioned.

The court also found that said land described in paragraph 2 of plaintiff's complaint was the identical land proposed to be taken by plaintiff for reservoir purposes and was necessary for the construction of said reservoirs and dams, and after the construction of the main dam said land was necessarily overflowed; that the defendant's predecessor in interest purchased said land together with other lands from the state on September 26, 1912, at public auction, after due notice had been given and proper proceedings had for the sale of said land, and that he paid therefor a sum exceeding ten dollars per acre, and as a conclusion of law the court found that the defendant was the owner and entitled to the possession of said land under a valid certificate of sale from the state of Idaho.

Counsel specifies as error the action of the court in holding that the defendant was the owner and entitled to the possession of said land, and in entering a decree to that effect.

The plaintiff claims title to, or at least an easement in, said land, because of its compliance with the provisions of House Bill 134, Laws 1901, p. 199, which act was thereafter amended in 1907 (Sess. Laws 1907, p. 527), and thereafter became sec. 1635, Rev. Codes of 1909. Said act of 1901 was

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amendatory of acts approved respectively March 2 and 6, 1899 (Sess. Laws 1899, pp. 282 and 408).

Sec. 8 of said act of 1901, under which the plaintiff sought to obtain said land for reservoir purposes, is as follows:

“Any person or persons desiring to construct a ditch, canal, reservoirs or other works for carrying or distributing the public waters for any beneficial use over or upon any of the lands owned or controlled by the state of Idaho, shall be allowed the right of way for the same by filing in the office of the state engineer a map showing the location of such land by an accurate survey of such ditch, canal, reservoir or other irrigation works. Such map shall be drawn on tracing linen on a scale of not less than 1,000 feet to the inch, and shall be accompanied by the field-notes of such survey of such irrigation works.

“In the case of a reservoir, the map shall show, by contour lines at intervals not greater than ten feet, the topographic features of such reservoir site, and shall state the capacity of such proposed reservoir in acre feet; and when the dam or embankment of such reservoir shall be more than ten feet in height, plans showing the construction of such dam or embankment shall be filed in the office of said state engineer as provided by law. All such maps, plans and field-notes shall be certified by the engineer under whose direction such surveys and plans were made. If such map or description is defective or incomplete, the state engineer may order the same to be corrected before the same shall be filed in his office: *Provided*, that the works for which the right of way is herein granted must be completed within the time mentioned in the application for the same (which shall accompany such map) which shall in no case be more than five years from the time of filing such application and map; and the construction of the works herein mentioned must be commenced within one year after such application and map are filed, and be prosecuted to completion diligently and uninterruptedly on a scale reasonably commensurate with the magnitude of the proposed works, in order to obtain the right of way under this section.”

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Plaintiff commenced proceedings under said act on September 21, 1903, to obtain the right to said land for reservoir purposes. In 1907, said sec. 8 was amended, but the only material change made was that of requiring compensation or at least \$10 per acre for land desired as a reservoir site, while under the act of 1901 the necessary estate in said land required for reservoir purposes was granted by the state without compensation.

The points presented for decision are: (1) Could the plaintiff obtain title or the necessary estate or easement in said land for reservoir purposes by compliance with said law of 1901, and if so, (2) did the plaintiff comply with the provisions of said act?

It is contended that the proviso contained in sec. 8, art. 9 of the state constitution, to wit, "No school lands shall be sold for less than ten dollars per acre," and such sale must be made at public auction, applies only to the divesting of the entire or fee-simple title of the state thereto, and that any estate in school lands less than a fee simple is not included in that constitutional provision; that sec. 14, art. 1 of the state constitution which grants the right of eminent domain, cannot apply to school lands if the constitutional provision of sec. 8, art. 9, includes rights of way, easements and other estates less than the fee-simple estates.

Sec. 8, art. 9 of the state constitution is as follows:

"It shall be the duty of the state board of land commissioners to provide for the location, protection, sale or rental of all the lands heretofore, or which may hereafter be granted to the state by the general government, under such regulations as may be prescribed by law, and in such manner as will secure the maximum possible amount therefor; *Provided*, that no school lands shall be sold for less than ten (10) dollars per acre. No law shall ever be passed by the legislature granting any privileges to persons who may have settled upon any such public lands, subsequent to the survey thereof by the general government, by which the amount to be derived by the sale or other disposition of such lands, shall be diminished, directly or indirectly. The legislature shall at the ear-

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liest practicable period, provide by law that the general grants of land made by Congress to the state, shall be judiciously located and carefully preserved and held in trust, subject to disposal at public auction for the use and benefit of the respective objects for which said grants of lands were made, and the legislature shall provide for the sale of said lands from time to time and for the sale of timber on all state lands and for the faithful application of the proceeds thereof in accordance with the terms of said grants; *Provided*, that not to exceed twenty-five sections of school lands shall be sold in any one year, and to be sold in subdivisions of not to exceed one hundred and sixty (160) acres to any one individual, company or corporation."

Sec. 14, art. 1, is as follows:

"The necessary use of lands for the construction of reservoirs, or storage basins, for the purpose of irrigation, or for rights of way for the construction of canals, ditches, flumes or pipes, to convey water to the place of use for any useful, beneficial or necessary purpose, or for drainage; or for the drainage of mines, or the working thereof, by means of roads, railroads, tramways, cuts, tunnels, shafts, hoisting works, dumps or other necessary means to their complete development, or any other use necessary to the complete development of the material resources of the state, or the preservation of the health of its inhabitants, is hereby declared to be a public use, and subject to the regulation and control of the state.

"Private property may be taken for public use, but not until a just compensation, to be ascertained in the manner prescribed by law, shall be paid therefor."

The provisions of said two sections must be construed to harmonize. Said sec. 8 prescribes the price and manner of sale of state lands; sec. 14 confirms the right of eminent domain. A conflict must necessarily result between the provisions of said sections if sec. 8 is construed to include the particular title or estate in land which, under section 14, is subject to the control of the state for a public use. If the provisions of said section 8 fixing the price and prescribing the manner of sale of state lands refer to easements and

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rights of way and prohibit the granting of such easements or rights of way for a price less than ten dollars an acre, and then only at public auction, can it be said that the provision of said section 14 giving the state control of such lands for public uses is not violated when the subjection of such lands to a public use is sought?

To exercise the right of eminent domain involves a judicial proceeding, and if after the court has determined the right to condemn, the land must be put up at public auction and sold for not less than ten dollars an acre, the condemnors would be placed in the position of not only having to pay the value of the land found by the court, but also must overbid at public auction anyone who might bid for said lands. The law of eminent domain only contemplates that the condemnor shall pay the price for the land fixed by the court, and he is not required to attend an auction sale where such land is put up at public vendue. For instance, if a person or company desires to establish a reservoir for impounding water for the reclamation of lands and the land suitable for such reservoir must be purchased at public auction, speculators by bidding on such land might greatly retard the development of the country.

Under the provisions of said sec. 14, it is provided that the necessary use of lands for the construction of reservoirs is declared to be a public use subject to the regulation and control of the state.

Under an act of Congress of July 26, 1866, 14 Stats. at L., p. 261, which was re-enacted in Rev. Stats. of the U. S. in sec. 2339 and somewhat amended but the meaning thereof not changed by such amendment, the right of way for the construction of ditches and canals over the public domain is acknowledged and confirmed. Congress recognized the fact that the rights of way for ditches, reservoirs and canals in the arid states and territories of the west were absolutely essential for the development of those states and territories, and while the act of Congress admitting Idaho into the Union provides that none of the lands granted by said act to the state should be sold except at public sale and for not less than

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ten dollars an acre, it was not intended that such act should be construed to be in contravention of the wise policy adopted by Congress by the act of 1866, and prevent the irrigation and reclamation of the arid lands of the state.

It is clear that the granting of a right of way for a ditch, canal or reservoir under the provisions of sec. 14, art. 1 of the state constitution is not a sale or disposal of the land such as is contemplated by said admission act, but simply the granting of an easement, the legal title to the land remaining in the state.

Sec. 5211, Rev. Codes, which is found in the chapter on eminent domain, provides as follows:

“The following is a classification of the estates and rights in lands subject to be taken for public use:

“1. A fee simple, when taken for public buildings or grounds, or for permanent buildings, for reservoirs and dams and permanent flooding occasioned thereby, or for an outlet for a flow, or a place for the deposit of debris or tailings of a mine;

“2. An easement, when taken for any other use;

“3. The right of entry upon, and occupation of, lands, and the right to take therefrom such earth, gravel, stones, trees and timber as may be necessary for some public use.”

This section was adopted in 1881, nine years or more prior to the adoption of our constitution. It classifies the estates and rights in land subject to be taken for a public use, and provides that a fee-simple title may be taken in the land for reservoirs and dams and permanent flooding occasioned thereby. But under the provisions of the constitution which clearly contemplate the subjection of state lands to certain public uses, the title in fee does not pass to the condemnor under eminent domain or other proceedings provided by the legislature for the subjection of state lands to public uses. It was intended in such classification not to have the compensation to be paid for land for reservoir or dam purposes reduced simply because an easement was taken or given rather than the fee-simple title, since it might be a perpetual easement or only temporary. If the land was abandoned and not

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used for the purposes for which it was condemned, the land was relieved of such easement and the owner of the fee would become entitled to the full possession thereof.

If it be held under the provisions of sec. 8, art. 9 of the constitution that state lands under condemnation proceedings must not be sold for less than ten dollars an acre, must it not also be held that state lands for that purpose must be sold at public auction? Shall this court construe that, in taking state lands for a public use, one of said provisions is binding and the other not? By holding that said provisions of sec. 8 are applicable when the state parts with the fee and not where it grants an easement, the sections of the constitution in regard to the sale of school lands and of eminent domain can be made effective and harmonious, and the material development of the state not hampered or retarded in the reclamation of the land belonging to the state as well as other desert land within the state.

In *Hollister v. State*, 9 Ida. 8, 71 Pac. 541, the court said: "When Idaho became a state, it at once necessarily assumed the power of eminent domain, one of the inalienable rights of sovereignty; and that right, we take it, may be exercised over all property within its jurisdiction. [Numerous authorities are here cited.] But even if Congress had the authority in granting these lands to the state, to restrict and prohibit the state in the exercise of the power of eminent domain, we do not think it was intended or attempted in the admission act. It was evidently the purpose of Congress in granting sections 16 and 36 in each township to the state for school purposes to provide that the revenue and income from all such lands should go to the school fund, and that when sold it should be at the highest market price. We cannot believe that Congress meant to admit into the Union a new state, and by that very act throttle the purposes and objects of statehood by placing a prohibition on its internal improvements. To prohibit the state the right of eminent domain over all the school lands granted would lock the wheels of progress, drive capital from our borders, and in many instances necessitate settlers

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who have taken homes in the arid portions of the state seeking a livelihood elsewhere.”

As a matter of history considerable land in the state of Idaho that has heretofore been reserved for reservoir purposes has already been abandoned, and that will be the case, no doubt, in regard to some of the lands now used as reservoirs. It is clear that where the right of eminent domain is exercised with reference to state lands, if it be held that a title less than fee simple is to be conveyed by such proceedings, and if at the same time the constitutional prohibition against sales other than at public auction at a minimum price of ten dollars per acre be construed to apply only where a fee-simple title is to be conveyed, then the two sections (sec. 14, art. 1, and sec. 8, art. 9) are reconciled, and both are made effective. It was not intended that a fee-simple title must be taken in case land is condemned for a reservoir, and in the case of condemnation of state lands it was clearly not intended that a fee-simple title should be taken to land for that purpose. If it were intended by the provisions of section 5211 to compel the condemnor to take the fee-simple title to land desired for a reservoir, it is clearly repugnant to the provisions of the constitution so far as reservoir, dam sites, etc., are concerned when applied to state lands.

Sec. 14, art. 1, of the constitution does not provide that the fee-simple title for state lands used as reservoirs must be taken, but does provide that “The necessary use of lands for the construction of reservoirs” shall be “subject to the regulation and control of the state,” meaning thereby that such matters shall be controlled by the legislature of the state by legislative enactment.

It was held in *Imperial Irr. Co. v. Jayne*, 104 Tex. 395, Ann. Cas. 1914B, 322, 138 S. W. 575, that the legislature had the power to exercise the right of eminent domain confided to it by the people and forever reserved to it by implication, and for a public use might grant an easement on any of the state's lands for rights of way for railroads, telegraphs and telephone companies and for dams and reservoir sites, and held that the power was inherent in the sovereign government, and

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that the exercise of that power did not deprive the legislature of its authority to sell the land on which such easements were granted, for the title in fee did not pass by the grant of the easement, and said: "The construction of the constitution here given is wholly in aid of the power of the legislature to sell the public school lands for the best price and to the best advantage, and in no manner recognizes the authority to divert or misappropriate any portion of that fund." While there is a distinction between the laws of Texas and the laws of Idaho, the distinction is one of form rather than of substance, and the general rule laid down there is applicable in this case.

The legislature in this state in dealing with the procedure for the taking of state lands for a public use may provide that such procedure may be taken in certain designated courts, or it may provide that the procedure of taking lands for public use may be had outside of the courts in the first instance. The procedure which the legislature may adopt is not necessarily limited to the courts, since the right of eminent domain is an inalienable right of sovereignty; and the legislature has the power to provide the way in which or by which this right may be exercised. Under our law, when land is taken for a public highway, appraisers are appointed to appraise the value of the land sought to be taken and no court procedure is required, and the legislature may provide any reasonable method whereby the rights of the parties will be protected in the exercise of the right of eminent domain.

The discussions which occurred in the Constitutional Convention dealing with school lands throw considerable light upon the proper construction to be placed upon said section and will be found in vol. 1, Idaho Const. Convention, pp. 649-669, 703-712, 730-765, 849, and vol. 2, p. 1450; and the discussion affecting sec. 14, art. 1, will be found in vol. 1, pp. 288-367, and vol. 2, pp. 1596-1602, 1606-1633.

The discussions in regard to said section 14 clearly indicate that the leading members of the Constitutional Convention had in mind the granting of easements for the purposes referred to in said section, and during the discussion the word

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"easement" was used a number of times, which indicates that the fee-simple title to lands taken for a public use was not in contemplation by the framers of said section 14. The first sentence of said section clearly indicates that easements were considered rather than the fee-simple title to the land. The sentence begins: "The necessary use of lands for the construction of reservoirs," etc., and at page 1619, vol. 2, Idaho Const. Convention, Judge Claggett, referring to the word "use" as used in said section, stated as follows: "If you were to strike out 'use,' by the way, from this section and put in 'easement,' it would be precisely the same thing in principle and in effect." And again, referring to said section, in vol. 1, p. 311, he said: "I think so far as the substitute is concerned, that that substitute can be amended in such a way as to provide for easements upon lands for those purposes, and leave the lands alone and let the title rest in them. An easement that will carry water over a party's land, an easement to build a ditch across a man's claim, an easement to go over a man's claim when necessary—all of which would be provided by the legislature, under the safeguards there put in—or a temporary possession for the purpose of sinking a shaft or running a tunnel—these things are absolutely necessary to be done, and I think the language of the substitute should be modified so as to cover any matters of this kind, to cover these matters of easement."

At least so far as some members of the convention were concerned, the rights sought to be granted by the provisions of sec. 14, art. 1 of the constitution were easements and not fee-simple titles, and it was intended that the just compensation for those easements must be paid, and if thereafter such lands were abandoned or ceased to be used for the purposes for which they were condemned, the title would remain where the law would leave it, in the owner of the fee, regardless of such condemnation proceedings.

While the writer of this opinion in his dissenting opinion in the case of *Hollister v. State*, 9 Ida. 651, 77 Pac. 339, took the position that a fee-simple title was taken of the land upon which the dam in that case was erected, upon further investi-

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gation of the matter I am satisfied that, under the provisions of sec. 14, art. 1 of the constitution, only the necessary use of land for reservoir or dam purposes is taken, which may result in the perpetual use of such lands for that purpose, or only a temporary use, and the title in fee to the land remains in the state. In the case of *Tobey v. Bridgewood*, 22 Ida. 566, 127 Pac. 178, it was held that an inhibition is placed upon the legislature in enacting a law which provides for the disposition of lands granted to the state by an act of Congress for less than ten dollars per acre, and that such sale shall be at public auction. The court in that decision proceeded upon the theory that the fee-simple title was taken or disposed of by the state for the public use therein mentioned; and the doctrine therein laid down that is contrary to the views expressed in this opinion is hereby expressly overruled.

We, therefore, conclude that the plaintiff obtained an easement in the land in question for reservoir purposes by compliance with the act of 1901.

The judgment of the trial court is therefore reversed and the cause remanded, with instructions to make finding of facts and enter judgment in favor of the plaintiff quieting its right to an easement for reservoir and dam purposes to the land involved in this case. Costs are awarded to the appellant.

MORGAN, J., Concurring.—I concur in the conclusion reached by the Chief Justice, but do so upon the ground that sec. 8 of the act of 1901 under consideration provides only for taking an easement or right of way upon or across school lands. It does not provide for the sale or leasing of such lands and is not, therefore, in contravention of sec. 8, art. 9 of the constitution, nor does it violate the prohibitive provisions of the act of Congress granting school lands to Idaho. It does not appear to me that the right or power of eminent domain is involved in this case.

BUDGE, J., Dissenting.—I cannot agree with the conclusions reached by my associates in this case, because, in my opinion, the identical question involved has been squarely

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passed upon, and rightly so, by this court, in the case of *Tobey v. Bridgewood*, 22 Ida. 566, 127 Pac. 178.

The complaint in this case, among other things, alleges: "That the plaintiff is now, and for a long time hitherto has been, the owner, in the possession of, and entitled to the possession of that certain lot, piece or parcel of land situate, lying and being in the county of Ada and state of Idaho, and bounded and described as follows, to wit." Then follows a description of the particular piece or parcel of land by metes and bounds containing 2.86 acres more or less. The complaint continues:

"That the said defendant claims an estate or interest therein, adverse to the said plaintiff.

"That the claim of the said defendant is without any right whatever, and that the said defendant has not any estate, right, title or interest whatever in said land or premises or any part thereof."

Then follows the prayer, wherein the plaintiff asks:

"That the defendant may be required to set forth the nature of his claim, and that all adverse claims of the defendant may be determined by the decree of this court.

"That, by said decree, it be declared and adjudged that the defendant has no estate or interest whatever in or to said land and premises; and that the title of plaintiff is good and valid.

"That the defendant be forever enjoined and debarred from asserting any claim whatever in or to said land and premises, adverse to the plaintiff, and that the plaintiff have such other relief as to this honorable court shall seem meet and agreeable to equity, together with the costs of suit."

The defendant answered, and also filed a cross-complaint, in which he admits the formal allegations of the plaintiff's complaint, that is to say, that the plaintiff is a corporation duly organized and existing under and by virtue of the laws of the state of Idaho, with its principal place of business at Boise, Idaho; but denies that the plaintiff is now, or ever has been, the owner, in the possession of, or entitled to that certain lot, piece or parcel of land, or any part thereof described in the plaintiff's complaint, being the land heretofore referred

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to. And alleges that he, the said defendant, is the owner of said property above referred to; and denies that his claim to the ownership of said property is without any right, or that he has no estate, right, title or interest in and to said land or premises, or any part thereof.

In his cross-complaint he alleges:

“That he is the owner of, and entitled to the possession of the SE. $\frac{1}{4}$ of NE. $\frac{1}{4}$ of section 36, Twp. 3 N., R. 1 W., B. M., and that he bases his title upon a sale certificate numbered 5028 from the state of Idaho to J. N. Kerr, which said certificate was duly assigned to this defendant and cross-complainant.

“That the plaintiff claims an estate or interest therein adverse to the said defendant and cross-complainant.

“That the claim of said plaintiff is without any right whatever, and that the said plaintiff has not any estate, right, title or interest whatever in said land or premises, or any part thereof.”

And the defendant prays:

“That he be dismissed hence without day as to said complaint, and recover his costs in this behalf sustained.

“That the plaintiff may be required to set forth the matter of his claim, and that all adverse claims of said plaintiff may be determined by decree of this court.

“That by said decree it be declared and adjudged that the plaintiff has no estate or interest whatever in or to said land and premises, and that the title of the said cross-complainant is good and valid.

“That the plaintiff be forever enjoined and debarred from asserting any claim whatever in or to said land and premises adverse to the defendant and cross-complainant, and that the cross-complainant have such other and further relief as to the court may seem just and equitable, together with the costs of this action.”

Upon the issues thus raised a stipulation of the facts was made by counsel for the respective parties, which is as follows:

“It is hereby stipulated by and between the attorneys for the respective parties in the above-entitled action that the following facts therein are true:

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“On the 26th day of April, 1912, O. O. Haga, made application to the State Board of Land Commissioners of the State of Idaho for the sale of the NE. $\frac{1}{4}$ of Sec. 36, Twp. 3 N., R. 1 W., B. M., all of said land being situate in Ada County, Idaho.

“That pursuant to such application the said State Board of Land Commissioners caused the land above set forth to be appraised, and said land was found by such appraisal to be of the value following, to wit, \$25.00, per acre.

“That thereafter the said State Board of Land Commissioners caused said land to be advertised for sale by publishing a notice thereof in the *Idaho Weekly Statesman*, a weekly paper published in Boise, Ada County, Idaho, said paper being published in the same county in which the land is situate, and a copy of which said publication is annexed hereto as Exhibit ‘A,’ and made a part hereof for a more particular statement of the matters and things appearing therein.

“That pursuant to such notice of sale the said land was offered at auction at the Courthouse at Boise, Idaho, on the 16th day of September, 1912, and J. N. Kerr, a citizen of the United States, being the highest and best bidder therefor, became the purchaser of the SE. $\frac{1}{4}$ NE. $\frac{1}{4}$ of Sec. 36, T. 3 N., R. 1 W., B. M., and received Sale Certificate No. 5028.

“That thereafter and prior to the commencement of this action the said J. N. Kerr duly assigned all his right, interest and estate in and to said land last above described, under and by virtue of said Sale Certificate No. 5028 to C. C. Fisher, the defendant herein.

“That all the proceedings necessary for the sale of the above-described land were regular and substantially conformed to the statutes of the State of Idaho in such cases made and provided.

“That all payments which have been due or become due under said sale certificate No. 5028 have been made by the defendant herein, C. C. Fisher, or his predecessors in interest, and no forfeiture of said sale certificate has ever been declared by the State Board of Land Commissioners of Idaho.

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“That the plaintiff is now and at all the times mentioned in the complaint herein, was a corporation duly organized and existing under and by virtue of the laws of the State of Idaho, with its principal place of business at Boise, Idaho.

“That on or about the 21st day of September, 1903, the plaintiff, for the purpose of constructing a reservoir to store water for the irrigation of arid lands within Ada County, Idaho, filed in the office of the State Engineer of the State of Idaho a map showing the location of the land necessary for the purpose of such reservoir by an accurate survey of said reservoir, such map being on tracing linen on a scale of not less than 1,000 feet to the inch, and was accompanied by field-notes of such survey of such reservoir. Said map showed by contour lines at intervals, not greater than ten feet, the topographic features of such reservoir site, the capacity of such proposed reservoir in acre-feet and said company filed plans showing the construction of the same required for such reservoir, said map, plans and field-notes were certified by the Engineer under whose direction such survey and plans were made; said map, plans and field-notes were approved by the State Engineer of the State of Idaho, on the 22d day of September, 1903.

“That the land described in paragraph two of the complaint herein is the identical land proposed to be taken by said company for reservoir purposes, and is the land described in the application and map above referred to, and is necessary for the construction of said reservoir, and ever since the completion of said reservoir said land has been necessarily used for such reservoir.”

The trial court made findings of fact from which, omitting the formal parts and avoiding a repetition of some of the facts heretofore referred to in the complaint of the plaintiff and in the answer and cross-complaint of the defendant, as well as in the stipulation of counsel, we have extracted the following:

“That on or about the 21st day of September, 1903, the plaintiff for the purpose of constructing a reservoir to store water for the irrigation of arid land within Ada County, Idaho, filed in the office of the State Engineer of the State

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of Idaho a map showing the location of land necessary for the purpose of such reservoir by an accurate survey of said reservoir, such map being on tracing linen. . . . Said map, plans and field-notes were certified by the engineer under whose direction such surveys and plans were made; said map, plans and field-notes were approved by the State Engineer of the State of Idaho, on the 22d day of September, 1903. . . .

“That the plaintiff did not make application to the State Board of Land Commissioners of the State of Idaho for the sale of the lands proposed to be taken by said company for reservoir purposes; that no appraisal of said land was made, and that no sale of said land was advertised or made at public auction or otherwise. That the plaintiff did not pay any consideration to the State of Idaho for said lands or the right to use the same for reservoir purposes or at all. That the only proceedings or actions on the part of the said plaintiff to procure a right to use said land for reservoir purposes was the filing of said map, plans and field-notes in the office of the State Engineer of the State of Idaho. . . .

“That on the 26th day of April, 1912, O. O. Haga made application to the State Board of Land Commissioners of the State of Idaho for the sale of the NE. $\frac{1}{4}$ of Sec. 36, Twp. 3 N., R. 1 W., B. M., all of said land being situate in Ada County, Idaho.

“That pursuant to such application the said State Board of Land Commissioners caused the land above set forth to be appraised, and such land was found by said appraisement to be of the value of Twenty-five Dollars (\$25.00) per acre.

“That thereafter the said State Board of Land Commissioners caused said land to be advertised for sale by publishing a notice thereof in the *Idaho Weekly Statesman*, . . .

“That pursuant to such notice of sale, the said land was offered at public auction in the courthouse at Boise, Idaho, on the 16th day of September, 1912, and J. N. Kerr, a citizen of the United States, being the highest and best bidder therefor became the purchaser of the SE. $\frac{1}{4}$ of NE. $\frac{1}{4}$ of Sec. 36, Twp. 3 North, Range 1 West, B. M., and received sale certificate No. 5028.

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“That thereafter, and prior to the commencement of this action, the said J. N. Kerr, duly assigned all his right, interest and estate in and to said land, above described, under and by virtue of said sale certificate No. 5028, to C. C. Fisher, the defendant herein.

“That all the proceedings necessary for the sale of the above-described land were regular and substantially conformed to the statutes of the State of Idaho in such cases made and provided.

“That all payments which have been due, or become due, under said sale certificate No. 5028, have been made by the defendant herein, C. C. Fisher, or his predecessor in interest, and no forfeiture of said sale certificate has ever been declared by the State Board of Land Commissioners of the State of Idaho.”

In its conclusions of law from the foregoing facts, the court held:

“That the defendant, C. C. Fisher, is the owner of and entitled to the possession of the land described in paragraph II of the complaint as against plaintiff herein, and that the said defendant C. C. Fisher, is the holder of a valid certificate of sale for the said land from the State of Idaho.”

From the foregoing recitals the issues between the parties can properly be said to resolve themselves into two propositions; First, the rights of the defendant, if any he has, are based upon a certificate of purchase of the land in question in accordance with the statutes of this state providing for the sale of state lands; second, the plaintiff and appellant bases its rights and title to the land in question upon the filing in the office of the state engineer on September 21, 1903, of a map in accordance with the provisions of sec. 8, House Bill 134, Sess. Laws of 1901, page 199, which statute provides for the acquiring of a reservoir site upon state lands.

It might be conceded, for the purpose of disposing of this case, that the plaintiff and appellant fully complied with all of the provisions of the aforesaid act; and it is not disputed that the defendant and his predecessor in interest received by purchase from the state whatever title the state had to

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convey at the date of the sale of the lands above described, to wit, September 6, 1912. But could plaintiff, by a full compliance with sec. 8, House Bill 134, Sess. Laws, 1901, p. 199, obtain title to the land in question, or a perpetual easement thereon, for a reservoir site? I think not.

Sec. 4 of the Idaho Admission Bill, found at page 54, vol. 1, Rev. Codes, provides:

“That sections numbered 16 and 36 in every township of said State, and where such sections or any parts thereof, have been sold or otherwise disposed of by or under the authority of any Act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one-quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said State for the support of common schools, such indemnity lands to be selected within said State in such manner as the Legislature may provide, with the approval of the Secretary of the Interior.”

Section 5 of that act, on same page, provides:

“That all lands herein granted for educational purposes *shall be disposed of only at public sale*, the proceeds to constitute a permanent school fund, the interest of which only shall be expended in the support of said schools. But said lands may, under such regulations as the Legislature shall prescribe, be leased for periods of not more than five years, and such lands shall not be subject to pre-emption, homestead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for school purposes only.”

Sec. 8, art. 9 of the Idaho constitution, provides:

“It shall be the duty of the State Board of Land Commissioners to provide for the location, protection, sale or rental of all the lands heretofore, or which may hereafter be, granted to the State by the general government, under such regulations as may be prescribed by law, and in such manner as will secure the *maximum possible amount therefor*: *Provided, That no school lands shall be sold for less than ten (10) dollars per acre.* No law shall ever be passed by the Legislature granting any privileges to persons who may have settled upon

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any such public lands, subsequent to the survey thereof by the general government, by which the amount to be derived by the sale, or other disposition of such lands, shall be diminished, directly or indirectly. The Legislature shall, at the earliest practicable period, provide by law that the general grants of land made by Congress to the State shall be judiciously located and carefully preserved and *held in trust*, subject to disposal at public auction for the use and benefit of the respective objects for which said grants of lands were made, and the Legislature shall provide for the sale of said lands from time to time and for the sale of timber on all State lands and for the faithful application of the proceeds thereof in accordance with the terms of said grants: *Provided*, that not to exceed twenty-five sections of school lands shall be sold in any one year, and to be sold in subdivisions of not to exceed one hundred and sixty (160) acres to any one individual, company or corporation."

Sec. 11, Idaho Admission Bill, *supra*, after enumerating the various grants made by Congress to the state for the establishment and maintenance of a scientific school, normal schools and various other institutions, provides that "None of the lands granted by this act shall be sold for less than \$10 an acre."

The Sess. Laws of 1901, p. 199, under which plaintiff and appellant claims to have initiated its right to the state land in question, were amended by the Sess. Laws of 1907, p. 527. But upon investigation, it will be found that the only material change made by the amendment of 1907 was that the act required compensation for state lands for reservoir purpose; or rights of way, etc., of at least ten dollars an acre; whereas, the 1901 Session Laws made no such requirement, and, as plaintiff and appellant contends, the necessary estate in the land was granted free upon compliance with the statute in the filing of maps in the office of the state engineer, etc.

I take the position that sec. 8, House Bill 134, Sess. Laws, 1901, p. 199, was in contravention of sec. 8, art. 9 of the constitution, and was, therefore, void. And this court held in *Tobey v. Bridgewood*, 22 Ida. 566, 127 Pac. 178, that the

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amendment to said section 8 of the 1901 Sess. Laws, contained in the Sess. Laws 1907, p. 527, was void. Consequently all the proceedings pursued in accordance with sec. 8, House Bill 134, *supra*, by the plaintiff and appellant, in order to secure a permanent right to the reservoir site involved in this litigation were without any force or effect.

In the case of *Tobey v. Bridgewood*, *supra*, Tobey received from the state board of land commissioners, after payment of the necessary amount of money, a deed to certain state land to be used as a reservoir site under the provisions of said Session Laws of 1907, *supra*. The negotiations between Tobey and the land board consisted simply of an application on the part of Tobey, payment by him of \$87.20, and the issuance of a deed by the board; no advertisement or other notice of sale having been given, and the sale not having been made at public auction. The question presented to the court was: What title, if any, did Tobey receive by such proceedings? The act of 1907 expressly provides that the state board of land commissioners, upon compliance with the terms of the act, might grant land for reservoir sites, rights of way, etc. The authority of the state board of land commissioners, under said act, to make a deed of conveyance of state lands to an individual for reservoir site, without such land being obtained by purchase at public auction, was directly involved. This court at that time, in construing sec. 8, art. 9 of the constitution, among other things, said:

“These constitutional provisions provide who shall constitute the state board of land commissioners, and the power and authority vested in said board, in granting such board the direction, control and disposition of the public lands of the state, *under such regulation as may be prescribed by law*; it is also provided in said section 8 that the legislature shall, ‘at the earliest practicable period, provide by law that the general grants of land made by Congress to the state shall be judiciously located and carefully preserved and *held in trust, subject to disposal at public auction for the use and benefit of the respective objects for which said grants of land were*

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made, and the legislature shall provide for the sale of said lands from time to time.' ”

The general grants of land by Congress to the state are held in trust, *subject to disposal at public auction*. This being true, the legislature is prohibited from enacting any law which provides for the disposition of lands granted to the state by an act of Congress in any other manner than as expressly provided in the act of admission and in the constitution; that is, by sale at public auction. The state board of land commissioners may lease any portion of the state land at a certain fixed rental and for a specified time, but it is not authorized, under the constitution or statutes of this state, to impair the title to state lands as was done in this case.

I am of the opinion that it was never intended by the legislature to provide for a method or system of disposing of or encumbering lands belonging to the state; or to permit the right to enter upon state lands or occupy the same for the purpose or use as a reservoir, or for any other purpose, except such right is obtained under the provisions of the constitution and the statutory laws of this state. The constitution and laws of this state absolutely prohibit the state board of land commissioners to dispose of the state lands in any other way than by sale at public auction, or by leasing them for a period of not to exceed five years.

It is argued in this case, as it was in the *Tobey v. Bridge-wood* case, “that if the power of the state board of land commissioners is limited by the constitution and the statute to the disposition of state lands by lease and sale only, it will annul the action of the state land board in many transactions that have been made in the state in relation to the granting of easements for ditches and also the disposal of state lands for reservoir and power sites and other public works, . . . it will retard and prevent the development of many industries in this state and the construction of works and improvements which contribute to the development and improvement of the lands, not only of this state, but likewise the lands that may be settled upon or improved under the laws

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of the United States. . . . As announced by this court in the case of *Pike v. State Land Board*, *supra* [19 Ida. 268, Ann. Cas. 1912B, 1344, 113 Pac. 447]: 'As a matter of policy and business expediency this argument might appeal to the board, but it cannot be considered by this court.' . . . The question of policy and business expediency which may have been pursued by the state board in the past, and which might be pursued in the future, should not control or guide this court in upholding and sustaining a policy, where such policy is absolutely prohibited by the provisions of the constitution and the laws of this state."

It is concluded in the majority opinion of this court that not a fee-simple title to the state lands in question, but only a right to the use of the same for reservoir purposes, is conveyed to the plaintiff and appellant; and, therefore, the constitutional provision above quoted and the statutes cited do not apply. In my opinion there is no merit in this conclusion. Sec. 5211, Rev. Codes, contains a classification of the estates and rights in lands subject to be taken for public use. The first subdivision is as follows:

"1. A fee-simple, when taken for public buildings or grounds, or for permanent buildings, for *reservoirs and dams and permanent flooding occasioned thereby*, or for an outlet for a flow, or a place for the deposit of debris or tailings of a mine; . . . "

The taking of the state land in question for reservoir purposes is in effect and under the above-quoted statute the acquiring of a fee-simple title to said lands, and it is not the creation of an easement only.

The state board of land commissioners has no authority, under the constitution, to impair the title to state lands; but, on the contrary, it is their duty "to provide for the location, protection, sale or rental of all the lands heretofore, or which may hereafter be, granted to the State by the general government, under such regulations as may be prescribed by law, and in such manner as will secure the maximum possible amount therefor." In the case at bar, the plaintiff and appellant made the state no compensation for the land in

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question, but it became entitled to the possession of the same for reservoir purposes by a gift. If it is within the power of the state board of land commissioners to give away even this small amount of state land, there is no reason in principle why, for the same or like purposes, that board could not give away as much of the state lands as may be applied for; and thereby defeat the very purpose and object of the constitution and statutes in this, that instead of securing the maximum possible amount for state lands, they would receive no compensation at all for the same. This court held in the case of *Balderston v. Brady*, 17 Ida. 567, 579, 107 Pac. 493, that "Any gift of school or other state lands or relinquishment of the state's title is in violation of the fundamental laws of the state and would be void."

The question of eminent domain is not involved in this case. The plaintiff and appellant did not seek to condemn the land in question for a reservoir site. Therefore, a discussion of that question is outside of this case and wholly immaterial to a determination of the issues involved.

The judgment of the trial court should be sustained under the constitution and statutes of this state and the decisions of this court heretofore rendered.

(September 24, 1915.)

JAMES SUMEY, Respondent, v. CRAIG MOUNTAIN LUMBER COMPANY, a Corporation, Appellant.

[152 Pac. 181.]

PERSONAL INJURIES—DAMAGES—EMPLOYEES' LIABILITY ACT—STATUTORY CONSTRUCTION—THEORY OF THE CASE—WHAT LAW GOVERNS.

1. The defendant owns and operates a sawmill at Winchester in Lewis county, and employed the plaintiff to pile or deck logs that were delivered at a point about six miles from said sawmill, which logs were to be conveyed to said mill and manufactured into lumber. While at work under said employment the accident causing

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the injury occurred, and the complaint was framed on the theory that this action is governed by the provisions of the Employers' Liability Act (Sess. L. 1909, p. 34). *Held*, under the facts of this case, that the trial court erred in trying the case upon the theory that it came within the provisions of said Employers' Liability Act.

2. The first section of said act provides, among other things, that "Every employer of labor in or about a railroad, street railway, factory, workshop, warehouse, mine, quarry, engineering work, and any building which is being constructed, repaired, altered or improved, . . . shall be liable to his employee or servant for a personal injury received by such servant or employee," etc. *Held*, that since the plaintiff was at work six miles or more from the sawmill of plaintiff, he was not at work "in or about" said sawmill, and therefore this action does not come within the provisions of said act.

3. *Held*, that said Employers' Liability Act does not govern every case of an employer's liability for injuries to his servant, but is only applicable to the specific cases enumerated in the act, being intended to supersede only so far the common-law duty of an employer to his employee and takes the place of the common-law liability in cases to which it is applicable.

APPEAL from the District Court of the Second Judicial District for Nez Perce County. Hon. Edgar C. Steele, Judge.

Action to recover damages for personal injuries. Judgment for the plaintiff. *Reversed*.

Charles L. McDonald, for Appellant.

"Statutes creating liability for causing death (Employers' Liability Law), while not strictly construed are not to be extended by implication, being in derogation of the common law." (*McClagherty v. Rogue River Electric etc. Co. (Or.)*, 140 Pac. 64.)

"About" commonly denotes nearness or proximity in degree. (1 Cyc. 196; *Featherman v. Hennessy*, 43 Mont. 310, 115 Pac. 983.)

"Words that are in common use among the people should be given the same meaning in the statute as they have among the great mass of people who are expected to read, obey and uphold them." (*Adams v. Lansdon*, 18 Ida. 483, 110 Pac. 280; *In re Bossner*, 18 Ida. 519, 110 Pac. 502; 1 Corpus Juris.

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338, and note; *Rankin v. Amazon Ins. Co.*, 3 Cal. Unrep. 330, 25 Pac. 260; *Trojan Mfg. Co. v. Fireman's Ins. Co.*, 67 Cal. 27, 7 Pac. 4.)

"This statute does not cover every case of an employer's liability to his employee, but only the specific cases enumerated in the act." (*Schulte v. Pacific Paper Co.*, 67 Or. 334, 135 Pac. 527, 136 Pac. 5.)

G. W. Tannahill, for Respondent.

"The word 'about' is a relative term, which may indicate one thing when applied to one state of facts, and another under different circumstances." (1 Cyc. 196.)

"In concern with; engaged in; dealing with; occupied upon." (1 Corpus Juris. 333.)

The above quotation, wherein the author states that the word means "in concern with," is peculiarly applicable to the circumstances under which the word is used in connection with the milling plant.

We must take into consideration the fact that the jammer was used in connection with the manufacturing plant; was in fact a part of the plant itself; and is therefore, a relative term. (1 Corpus Juris. 333; *Brooke v. Warwick*, 12 Jur. 912, 913; *Powell v. State*, 63 Ala. 177.)

The only case we have been able to find in the state of Idaho in which this act has been considered at all is the case of *Chiara v. Stewart Min. Co.*, 24 Ida. 473, 135 Pac. 245, in which the court holds that the purpose of the act was to extend the right of employees and limit the defense of employers in cases of personal injury. This end would be frustrated if appellant were permitted to successfully interpose the highly technical defense by which it seeks in this case to defeat respondent's recovery. (Labatt, Master & Servant, sec. 1840 (3); 4 Thompson, Law of Negligence, sec. 4582; *Shain v. Sloan*, 38 Scot. L. R. 475, 8 Scot. L. T. 498; *Mooney v. Edinburgh etc. Co.*, 38 Scot. L. R. 260; 9 Scot. L. T. 366.)

SULLIVAN, C. J.—This action was brought by the plaintiff to recover from the appellant, the Craig Mountain Lumber

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Company, \$2,995 on account of personal injuries alleged to have been received while employed in decking logs for the appellant.

The case was tried by the court with a jury and a verdict was rendered in favor of the plaintiff and judgment entered thereon for the sum of \$2,995 and costs of suit.

A number of errors are assigned, the principal one being that the court erred in trying the case and instructing the jury on the theory that under the facts of the case it fell within the provisions of an act of the legislature known as the "Employers' Liability Act," Laws 1909, p. 34.

The appellant corporation is engaged in operating a sawmill at Winchester, in Lewis county. The plaintiff was at the time of the injury working at a point known as "Farmers' Landing," situated about six miles from appellant's sawmill, and was receiving there from farmers living in that vicinity sawlogs and piling or decking them, which logs were subsequently to be conveyed to said mill and manufactured into lumber. The plaintiff was employed as a "cant-hook" man, which term is understood to be an all-round hand for handling logs. Plaintiff was put to work placing the logs at the top of the pile or deck at which place they were hoisted by an instrument called a "jammer." The motive power for hoisting said logs was a team of horses. The plaintiff apparently understood the work and gave satisfaction. The "jammer" was a large apparatus consisting of several strong, heavy poles in tripod shape which stood at the rear of the pile of logs, over the top of which appliance a cable ran, the end of the cable being attached to a block. From this point two separate cables ran out, at each end of which was affixed a hook. This was known as the "crotch." When it was desired to elevate a log on to the deck or pile, one of the hooks at the end of the crotch was inserted in each end of the log and the team, which was attached to the other end of the cable, starting up, pulled the log on to such part of the deck as it was desired to place it. The plaintiff's duties consisted of locating the place where the log was to rest on the deck, and, as the team came back for another log, in the event the

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hooks did not come out of the log, to remove the same so that the men below could pull them down.

The defendant contended at the trial that the injury sustained was due entirely to the plaintiff's own negligence, and that had he used ordinary diligence in safeguarding himself, no injury whatever would have occurred, and that the hazard and danger in the work was obvious and patent, and that the plaintiff fully realized that fact.

We have perhaps gone more into detail in this case than was necessary, since the complaint is framed on the theory that the case was governed by the terms, conditions and limitations of the Employers' Liability Act (Sess. L. 1909, p. 34), while the defendant contends that its liability in this matter, if any, should have been measured according to the terms of the common law as enlarged or modified by the statutes of this state, and not by the provisions of said Employers' Liability Act.

The court in the trial of the case proceeded upon the theory that the case came within the provisions of said Employers' Liability Act. During the trial counsel for plaintiff offered in evidence the notice served upon the appellant required to be served by said act. Thereupon objection was made on the ground that said notice was irrelevant and immaterial, since this action does not come under the terms of said act. Thereupon the court said: "I think it must come under the terms of that act or they must fail. I will overrule the objection."

Now, unless said right of action comes within the said Employers' Liability Act, the case must be reversed.

The first section of said act, among other things, provides as follows:

Every employer of labor in or about a railroad, street railway, factory, workshop, warehouse, mine, quarry, engineering work, and any building which is being constructed, repaired, altered, or improved by the use and means of a scaffold, temporary staging, or ladders, or is being demolished, or on which machinery driven by steam, water or other mechanical power is being used for the purpose of construction, repair or demolition thereof, shall be liable to his employee

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or servant for a personal injury received by such servant or employee in the service or business of the master or employer within this state when such employee or servant was at the time of the injury in the exercise of due care and diligence in the following cases": Then follow six cases or provisions, and some other matter.

If we concede that a sawmill comes within the definition of "factory," as used in said section, the question is presented whether the plaintiff under the facts of this case should be considered as having been working when the injury occurred "in or about" the sawmill of the plaintiff, the condition precedent to the applicability of the act in question. It seems clear to us that the defendant was not an employee of the defendant "in or about" its said mill.

In *In re Bossner*, 18 Ida. 519, 110 Pac. 502, this court held that words used in a statute without any technical meaning or application should be given their ordinary significance as they are popularly understood, and that the language used by the legislature must be considered in the light of the common acceptance of the terms employed.

The plaintiff, in order to recover, must show that he comes within the provisions of said Employers' Liability Act, and must show that he was an employee "in or about" said sawmill. In order to hold that he comes within the provisions of said act, the court must hold that a point six miles distant from said mill where the defendant was injured, and with no direct communication with said mill, is "in or about" said mill. To so hold would in effect be extending by implication the terms of said act beyond what the ordinary significance of the words used in said act clearly means as they are popularly understood.

The intent of the legislature in limiting the operation of said statutes to a point "in or about" a factory, etc., obviously was due to the fact that it was the duty of the employer to have some responsible agent or other person immediately in charge of the work at the mill itself to whom the employee could look for direction. We do not think it was the intent that said act should cover the entire ramifications of the

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sawmill company, extending miles away from its plant and not connected therewith. Had the legislature intended that construction to be placed upon the act, they certainly would have used language indicating such intention. We think the language of the act should be given its plain, ordinary meaning and limited to employees actually "in or about" the defendant's mill.

The effect of said Employers' Liability Act is to limit the defenses formerly available to the defendant under the common law to those specifically provided for in the statute.

In *Chiara v. Stewart Min. Co.*, 24 Ida. 473, 135 Pac. 245, this court said:

"We may say, however, that the act of March 6, 1909, appears to have been adopted for the purpose of extending the rights of employees and limiting the defenses previously accorded to employers. The main purpose, evidently, was to abrogate the fellow-servant doctrine. This latter statute is almost an exact counterpart of a similar statute which has long been in force in Massachusetts, Alabama, Mississippi, South Carolina, Oregon and Colorado."

Upon this question, see, also, *Schulte v. Pacific Paper Co.*, 67 Or. 334, 135 Pac. 527, 136 Pac. 5.

Under the facts as they appear in the instant case, the defendant's liability should have been measured according to the common law, and the defendant should have had the right to avail itself of all the defenses to which it is entitled under the common law and the statutes of this state, aside from said Employers' Liability Act, and the trial court erred in holding that this action came under said act.

The court having reached the conclusion above stated, it will not be necessary for it to pass upon other assignments of error involving instructions and other matters. Since the trial court instructed the jury on the theory that the injury fell within the provisions of the Employers' Liability Act, it necessarily follows that the instructions are erroneous, as we have held that the case did not come within said act.

The judgment must therefore be reversed, and it is so ordered, with costs in favor of the appellant. The cause is re-

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manded for further proceedings in accordance with the views expressed in this opinion.

Budge and Morgan, JJ., concur.

(September 25, 1915.)

STATE OF IDAHO, R. T. WEAVER, E. C. DAVIS, E. H. PEMBER, N. R. DAVIS, OSCAR NOH, HERMAN L. BRANT, J. W. BRANT, W. B. HOAG, J. L. VREDENBURGH, JOHN I. DEEDS, T. F. WARNER and ROBERT ACKLESON, Plaintiffs, v. THE TWIN FALLS CANAL COMPANY a Corporation, Defendant.

[151 Pac. 1013.]

MANDAMUS—Irrigation Projects—Rights of Purchasers of School Lands.

1. Upon authority of *State v. Twin Falls Canal Co., a Corporation*, 21 Ida. 410, 121 Pac. 1039, *held*, that purchasers of school lands within the reclamation project of said canal company are entitled to purchase and have issued to them shares of water right stock in said corporation, and that the peremptory writ of mandate issue.

Petition for writ of mandate. Demurrer to defendant's answer sustained and peremptory writ issued.

J. H. Peterson, Attorney General, E. G. Davis, T. C. Coffin and Herbert Wing, Assistants, for Plaintiffs, file no brief.

A. M. Bowen, for Defendant, cites no authorities.

George Herriott, *Amicus Curiae*.

The settler has the permanent right to enough water to thoroughly irrigate. Otherwise the object of the Carey Act would be defeated. And furthermore, it is clearly shown by the language of sec. 16 of the state contract that the lands

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segregated under said act have a prior right over other lands. (*McKinney v. Big Horn etc. Co.*, 167 Fed. 770, 93 C. C. A. 258.)

MORGAN, J.—This action was commenced for the purpose of procuring from this court a writ of mandate to compel the defendant to issue shares of water right stock to the plaintiffs, other than the state of Idaho, they being purchasers of state lands included within the irrigation project of the defendant corporation. The facts alleged in the complaint are substantially the same as those relied upon by the plaintiffs in *State of Idaho and H. T. West v. Twin Falls Canal Co.*, 21 Ida. 410, 121 Pac. 1039, and the lands involved in this case for which water rights are sought are a part of the state school lands mentioned therein. The contract and conditions governing this case are fully discussed in the other, so they need not be restated here. An alternative writ of mandate was issued and the defendant filed its answer to the complaint. The plaintiffs have demurred to the answer upon the ground that it does not state facts sufficient to constitute a defense, and they rely upon the decision of this court in the case above cited.

The defense offered by the answer is practically the same as that relied upon in said case of *State of Idaho and H. T. West v. Twin Falls Canal Co.*, *supra*, but the defendant seeks to distinguish this case from that and alleges as follows:

“Defendant admits that some of the issues and questions involved in the present refusal of defendant to issue or sell shares of stock in the defendant company for the lands described in the complaint are similar to the issues raised in said last-named case, but defendant denies that the said suit was or is decisive of the issues raised in this case, or that the same is in any way decisive of the issues in this case as a matter of law; defendant alleges in this respect that the said case was decided by the supreme court upon the demurrer to the answer of the defendant therein; that the supreme court of this state assumed as true certain facts which were not intended to be admitted, and that said decision was based upon

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the state of facts greatly at variance with the real state of facts concerning the subject matter of the rights of the state to secure by mandate shares of stock in the defendant company, all of which will more particularly appear in this defendant's answer. Defendant further says that it is not the intention of this defendant to disregard in any way the decision of the supreme court of this state in the case above mentioned, but the defendant company makes this its answer to the complaint of the plaintiff for the reason that the defendant company believes that the decision in the said case was rendered and decided upon a misapprehension as to the facts and law governing the rights of the respective parties."

It is also alleged in the answer that if defendant is compelled to make its present water supply, even though it has the use of water to its entire capacity, do duty upon more lands than that belonging to its present stockholders who are entitled to its use under their contracts, it will be unable to deliver to any stockholder a supply of water ample to irrigate his land; that it is provided in and contemplated by said contract that each water right holder is and shall be entitled to the use and to have delivered to him $1/80$ of a second-foot per acre, said amount to be delivered at a point not further than one-half mile from the place of intended use, and that in order to enable it to deliver that amount of water to its present stockholders, all of the present available supply is and will continue to be necessary for that purpose; also, that in order for defendant's present stockholders to have a supply of water ample in volume to thoroughly irrigate their lands, it will be necessary for them to have $1/80$ of a second-foot per acre, and that it will be unable to adopt any system of rotation or any other system of delivery by which the present available water supply can do duty to more than the lands of the present stockholders and furnish them with an adequate amount of water for irrigation purposes.

It is further alleged in the answer that an action has been commenced and is pending in the district court of the fourth judicial district in and for Twin Falls county by one Eldridge

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and others, who are owners of water right stock in said defendant corporation, against the defendant herein, for the purpose of restraining it from selling or transferring any portion of the stock held by it or of selling any water rights in its irrigation system, and that a temporary injunction to that effect has been issued. A copy of the complaint in that case is attached to and made a part of the answer in this, and in it is alleged as a cause of action the same state of facts relied upon by the defendant here as a defense. The fact that the injunction suit is pending in the district court does not constitute a defense in this case, and the questions of law presented therein, so far as they affect the rights of the parties to this case, may be determined here.

All the material facts alleged in the answer, other than the pendency of the injunction suit, were alleged in defendant's amended answer in the case of *State v. Twin Falls Canal Company supra*, and were, for the purposes of the demurrer lodged against it admitted to be true. These facts were fully considered by the court, and the conclusion was reached that they did not constitute a defense to plaintiffs' cause of action.

Upon the authority of the said case of *State v. Twin Falls Canal Co., supra*, we conclude that the answer in this case does not state facts sufficient to constitute a defense. The demurrer is sustained and the peremptory writ of mandate will issue. Costs are awarded to the plaintiffs.

Sullivan, C. J., and Budge, J., concur.

Points Decided.

(September 30, 1915.)

GOOD ROAD DISTRICT NO. 2 OF WASHINGTON COUNTY, a Municipal Corporation, Appellant, v. WASHINGTON COUNTY, a Municipal Corporation, and FRANK E. SMITH, Clerk of the District Court and *ex-officio* Auditor and Recorder of Washington County, Respondents.

[152 Pac. 183.]

SUBSTITUTION OF PARTIES—TAX LEVY IN GOOD ROAD DISTRICTS—APPORTIONMENT FOR CONSTRUCTION AND REPAIR OF ROADS AND BRIDGES.

1. *Held*, under sec. 4108, Rev. Codes, that Weiser Valley Highway District is entitled to be substituted for, and in lieu of, Good Road District No. 2.

2. The purpose of the enactment of sections 1049 to 1060, inclusive, Rev. Codes, and the amendments thereto (secs. 1056 and 1058 amended, Sess. Laws, 1909, pp. 172, 173, sec. 1054 amended, Sess. Laws, 1911, p. 188, and sec. 1056 amended, Sess. Laws, 1915, p. 48), was to create good road districts and provide for the raising of money by tax levies for the construction and improvement of highways within such districts.

3. "Highways," as defined by sec. 874, Rev. Codes, "are roads, streets or alleys, and bridges, laid out or erected by the public, or if laid out or erected by others, dedicated or abandoned to the public."

4. Sec. 1056, Rev. Codes, as amended, Sess. Laws, 1909, pp. 172, 173, provides *inter alia* that "the county auditor shall set apart seventy-five per cent (75%) of the general tax levy raised for road purposes in the district to the credit of such district, which shall constitute a fund for the improvement of the roads in such district." *Held*, that it was the intention of the legislature to include the tax levy for bridge as well as for road purposes, and that it is the duty of the county auditor to set apart 75 per cent of the general tax levy raised in a good road district for both road and bridge purposes to the credit of such district for the improvement of its roads and bridges.

APPEAL from the District Court of the Seventh Judicial District for Washington County. Hon. Ed. L. Bryan, Judge.

Opinion of the Court—Budge, J.

Action to recover tax collections made by Washington county for bridge purposes in a good road district. Judgment for defendant. *Reversed.*

Ed. R. Coulter, for Appellant.

The terms "highway" and "road" have been used indiscriminately, and are synonymous in our statute. (Secs. 874, 882 and 936, Rev. Codes.)

Reference to the definition of "roads," "highways" and "bridges" as found in "Words and Phrases" shows that the general interpretation given by all authorities of the various states is to the effect that bridges are a part of roads and highways.

A change in the limits of a municipality by annexing territory thereto does not change the identity of the corporation or affect the title of property which it holds at the time of the annexation. As a general rule, on the consolidation of municipal corporations, or the annexation by one municipality of the territory of another, under legislative authority, the property and assets of the old corporations or the corporation whose territory is annexed becomes, in the absence of provisions to the contrary, the property and assets of the consolidated or annexing corporation. (28 Cyc. 219, and cases cited; *Maumee School Tp. v. Shirley City School Town*, 159 Ind. 423, 65 N. E. 285.)

James Harris, for Respondents.

Sec. 896, Rev. Codes, as amended by chapter 60 of the 1911 Sess. Laws determines definitely that there is a distinction in law between a tax for road purposes and a tax for bridge purposes. It must follow that the phrase "general tax levy raised for road purposes" means the same in one section of the law as in another and that when it is used in sec. 1056 it was intended to indicate the same tax as it did in sec. 900 and as it does in sec. 896.

BUDGE, J.—The plaintiff, Good Road District No. 2, was duly organized and created under the general laws of the

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state of Idaho applicable to the good road districts, and was exercising the functions of such district in pursuance of sections 1056 to 1060, Rev. Codes, as amended Sess. Laws 1909, p. 172, prior to and during the years 1910, 1911 and 1912.

On September 1, 1913, the board of commissioners of said good road district failed to provide or levy a tax upon the assessable property within said district as provided by sec. 1056, Rev. Codes, as amended, *supra*; and it never at any time voted bonds for the improvement of roads within that district.

On December 8, 1914 the territory within Good Road District No. 2 together with adjoining lands was duly organized into a highway district known as the "Weiser Valley Highway District," of Washington county.

This action was instituted by the appellant in the district court of the seventh judicial district in and for Washington county, on July 25, 1913. Judgment was rendered January 28, 1914. This appeal was perfected during the month of February, 1914. The order creating the Weiser Valley Highway District was duly entered on December 17, 1914.

Upon the hearing of this cause, the appellant by proper notice and motion moved this court to enter an order substituting the Weiser Valley Highway District of Washington county in lieu and instead of Good Road District No. 2. This motion for substitution is based on sec. 4108, Rev. Codes, which provides that "An action or proceeding does not abate by the death or any disability of a party, or by the transfer of any interest therein, if the cause of action or proceedings survive or continue. In case of the death or any disability of a party, the court, on motion, may allow the action or proceeding to be continued by or against his representative or successor in interest. In case of any other transfer of interest, the action or proceeding may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding."

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It appears from the motion and the affidavits of counsel for appellants that the territory included in Good Road District No. 2 and the Weiser Valley Highway District is practically the same. The general boundaries of the two districts do not differ materially and the assessed valuation of each is approximately the same. We are therefore of the opinion that the showing is sufficient to authorize the court in allowing appellant's motion for substitution of Weiser Valley Highway District in lieu of Good Road District No. 2; and, therefore, motion to dismiss this cause of action is denied.

This action was brought by Good Road District No. 2, now Weiser Valley Highway District of Washington county, plaintiff below and appellant here, against Washington county, a municipal corporation, and Frank E. Smith, clerk of the district court and *ex-officio* auditor and recorder of Washington county defendants below and respondents here, to recover from said Washington county seventy-five per cent of the moneys levied and collected from within said good road district, during the years 1910, 1911 and 1912, and placed in what the respondents term the "general bridge fund" of Washington county for said years.

To the complaint of the plaintiff below the defendant interposed a general demurrer, which demurrer was by the court sustained, and judgment was entered in favor of respondents and against appellant. From that judgment this appeal is taken.

There are three causes of action in the complaint. The allegations contained in the second and third causes of action are the same as to all matters, except that the second cause of action is for the year 1911 and the third is for 1912. For each of these years the board of county commissioners of Washington county made a general levy on all of the assessable property of the county for road purposes, and a like general levy for bridge purposes. The county assessor during these years collected the taxes pursuant to such levies. After the taxes were collected, the county auditor of Washington county set apart to the appellant road district seventy-five per cent of the taxes raised pursuant to the levy for road pur-

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poses, but refused to pay over to said road district seventy-five per cent of the money collected in that district pursuant to the levy for bridge purposes.

These levies were made in compliance with sec. 1056, Rev. Codes, as amended Sess. Laws 1909, p. 172, which provides:

“It shall be the duty of the board of good road commissioners to provide for a tax levy each year, within their respective districts, upon all the assessable property within their respective districts, sufficient to pay the interest on bonds outstanding against such district, also to pay any other indebtedness incurred during the year in which such levy is made; and also to provide for a permanent sinking fund of not less than five per cent of the bonded indebtedness of their district. They shall, on or before the first day of September of each year, make an estimate of the amount of money necessary to be collected, together with the amount of assessable property within their district, together with the names of the owners thereof, and shall deliver said list to the county auditor of their respective counties. The county auditor shall apportion such assessment to each property owner within said district according to the values as returned by the county assessor of the county in which such district is located, and all taxes so levied shall become a valid lien against such property, and shall be collected by the county assessor as other taxes are collected. For the purpose of providing moneys for the more extensive improvement of roads in such districts, there is hereby appropriated and the county auditor shall set apart seventy-five per cent (75%) of the general tax levy raised for road purposes in the district to the credit of such district, which shall constitute a fund for the improvement of the roads in such district.”

This suit was instituted by the appellant to compel the county auditor of Washington county to make the same apportionment of the moneys received by reason of said levy from the inhabitants of Good Road District No. 2 for bridge purposes as was made for road purposes.

Appellant bases its right to recover upon sec. 1056, Rev. Codes, as amended, Session Laws 1909, *supra*. The question

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involves the construction of the latter portion of that section, namely, that "there is hereby appropriated and the county auditor shall set apart seventy-five per cent (75%) of the general tax levy raised for road purposes in the district to the credit of such district, which shall constitute a fund for the improvement of the roads in such district."

The Session Laws of 1915, at page 48, removed all doubt, so far as this question is concerned, by adding to said section the words "and bridge purposes," so that that portion of the section as amended now reads: "For the purpose of providing moneys for the more extensive improvement of roads in such districts, there is hereby appropriated and the county auditor shall set apart seventy-five per cent (75%) of the general tax levy raised for road and bridge purposes in the district to the credit of such district, which shall constitute a fund for the improvement of the roads and bridges in such district." This amendment was no doubt due to a misunderstanding between the county commissioners and the commissioners of the good road district; the latter contending that they were entitled to receive seventy-five per cent of the funds resulting from the general tax levy for bridge as well as for road purposes received from their respective districts.

We do not call attention to the amendment of Sess. Laws 1915, p. 48, for the purpose of establishing a rule of statutory construction; nor do we intend to hold that a subsequent amendment to a statute, such as this one, in and of itself determines the construction that should be placed upon the prior statute; but simply direct attention to this later act of the legislature which, to us, is an obvious indication of the object sought to be attained in the organization of these road districts, and the expenditure of money raised by general tax levies within them.

The purpose of the enactment of sections 1049 to 1060, inclusive, Rev. Codes, and the amendments thereto (secs. 1056 and 1058 amended, Sess. Laws, 1909, pp. 172, 173, sec. 1054 amended, Sess. Laws, 1911, p. 188, and sec. 1056 amended, Sess. Laws, 1915, p. 48), was to create good road districts and to provide means whereby money could be raised by a general

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levy from the inhabitants residing within the boundaries of a good road district to be expended for the construction, improvement and repair of the highways within said district.

Sec. 874, Rev. Codes, defines highways as follows:

“Highways are roads, streets or alleys, and bridges, laid out or erected by the public, or if laid out or erected by others, dedicated or abandoned to the public.”

From a reading of this section it clearly appears that bridges are included in, and made a part of, roads or highways. And a reasonable construction of sec. 1056, Rev. Codes, as amended, *supra*, will support the conclusions we have reached that the legislature intended that seventy-five per cent of the general tax levy for road purposes included both road and bridge purposes; that road districts were entitled to receive seventy-five per cent of the moneys paid in by reason of a general levy to be used for the purpose of improving, extending, constructing and repairing roads and bridges within such districts; and that twenty-five per cent of the moneys raised under a general levy within a good road district should be expended by the county commissioners under the general law governing the expenditures of money raised for road and bridge purposes within the county.

The trial court erred in sustaining the demurrer to appellant's complaint. This cause is remanded, with instructions to the trial court to overrule the demurrer and direct the respondents to answer. Costs are awarded to appellant.

Sullivan, C. J., and Morgan, J., concur.

Points Decided.

(October 1, 1915.)

MRS. FRED H. LOHR, Appellant, v. BOWEN CURLEY,
Respondent.

[152 Pac. 185.]

DELINQUENT TAX SALE—MISTAKE OF OFFICIAL—AFFIDAVIT FOR PUBLICATION OF SUMMONS—DUE DILIGENCE—JURISDICTION OF COURT.

1. Where a nonresident property owner had paid taxes on a city lot described as lot 33, block 44, of Crow's Addition to the city of Idaho Falls, from the year 1892 up to and including the year 1904, but in 1904 the tax payment was erroneously credited by the assessor and tax collector to lot 33, block 48, with the result that the taxes for 1904 on lot 33, block 44, appeared to be delinquent, and thereafter said lot was sold to the county for delinquent taxes, and subsequently a purchaser from the county obtained a tax deed therefor; *held*, that when the county issued the certificate of sale for said lot to itself, such certificate was not based upon any lien legally created against said property, and the assignment of such certificate and subsequent tax deed based thereon did not divest the rightful owner of title.

2. Sec. 4145, Rev. Codes, as amended, Sess. Laws 1909, p. 186, setting forth the requirements for the publication of summons against a nonresident defendant or one whose whereabouts are unknown, and prescribing that "an affidavit setting forth in ordinary and concise language any of the grounds as above set forth upon which the publication of the summons is asked for, shall be sufficient without setting forth or showing what efforts have been made or what diligence has been exerted in attempting to find the defendant," does not dispense with the use of due diligence to ascertain the residence or postoffice address of the defendant, and the mere assertion of diligence in the affidavit is not a compliance with the statute. Where it is shown that by the exercise of ordinary diligence such facts might have been ascertained, the court will be deemed not to have acquired jurisdiction over a defendant by publication of summons based on such affidavit.

3. Where, in a suit to quiet title brought by the holder of a tax deed for a city lot, the plaintiff makes affidavit for publication of summons to the effect that the former owner of the property, named as a defendant, could not after due diligence be found within the state of Idaho or at all, and that the plaintiff could not after due diligence ascertain the residence or postoffice address of the

Argument for Appellant.

said defendant, when it appears that the true name and address of said former owner are given in full upon the county assessment-roll, both before and after the sale of said property for delinquent taxes, and at the time said suit was brought, held, that the maker of said affidavit did not use the diligence that the law requires.

4. If the owner of land, or one having interest therein, applies to the proper officer for the purpose of paying the tax thereon, and payment is refused or prevented by such officer through a mistake on his part, such tender of payment is the equivalent of payment of such tax, to the extent that it bars the attaching of a lien based upon actual nonpayment.

APPEAL from the Ninth Judicial District for Bonneville County. Hon. James G. Gwinn, Judge.

Action to quiet title to certain property in Idaho Falls. Judgment for defendant. *Reversed.*

A. S. Dickinson, for Appellant.

A payment to the proper officer is a sufficient payment of the tax, whether the county actually gets the money or not; the tax lien is thereby discharged, and the county has no right thereafter to sell the property and can acquire no equity therein by such a sale. Such a sale is void and the assignee of such certificate can acquire no equity in the land. (*Griffith v. Anderson*, 22 Ida. 323, 125 Pac. 218; *Taylor v. Debritz*, 48 Wash. 373, 93 Pac. 528; *Bullock v. Wallace*, 47 Wash. 690, 92 Pac. 675.)

The acts, orders and judgments of courts which are irregular or void are chargeable to the party procuring them, and it is their duty to see that they are correct. (*Park v. Higbee*, 6 Utah, 414, 24 Pac. 524; *Parsons v. Weis*, 144 Cal. 410, 77 Pac. 1007.)

An inspection of the affidavit for publication of summons shows that the same fails to state whether or not the appellant, who was a defendant in that action, resided within this state or was a nonresident. It simply states that she cannot after due diligence be found within the state of Idaho, or at all. (*Mills v. Smiley*, 9 Ida. 325, 331, 76 Pac. 783; *Ricketson v. Richardson*, 26 Cal. 149, 154.)

Argument for Respondent.

Another feature of this affidavit is the further allegation, "Nor can the plaintiff, after due diligence, ascertain the residences or postoffice addresses of any of the defendants" (naming them). An examination of plaintiff's exhibits "B," "G," "H" and "I" leads to the conclusion that this allegation was wilfully false. He had only to go to the tax-rolls of Bingham county, with which he was presumed to be familiar, and there he would have found both the postoffice address and the street residence of the appellant for the last eighteen years, and that she had been the owner and paying the taxes on lot 33 in block 44 of Crow's Addition to Idaho Falls all those years. By this statement in the affidavit he induced the clerk to make an order to the effect that no copy of the summons and complaint need be mailed to any of the defendants, which was entirely unauthorized by law and a nullity. None was mailed and the appellant had no notice of that action or information concerning it until 1912, after the commencement of this action. (*Strode v. Strode*, 6 Ida. 67, 96 Am. St. 249, 52 Pac. 161; *Mills v. Smiley*, *supra*; *Goodale v. Coffee*, 24 Or. 346, 33 Pac. 990; *Irvine v. Leyh*, 102 Mo. 200, 14 S. W. 715, 126 S. W. 10, *Dunlap v. Steere*, 92 Cal. 344, 27 Am. St. 143, and note, 28 Pac. 563, 16 L. R. A. 361.)

St. Clair & St. Clair, for Respondent.

The method of preparing the assessment-rolls for 1904, 1906, 1908 and 1909 would preclude the possibility of a person, by examination of the tax-rolls, finding an assessment of this or any other property where the assessment was made in the name of a stranger to the record title. In this case the record title at that time stood in Mathilda Jahr, and we were entitled to bring suit to quiet title for Mr. Curley against the appellant in the name under which she held title, being the name of Mathilda Jahr. As the record showed title in Mathilda Jahr, it could not reasonably or at all be expected that search of the tax-rolls be made for an assessment in the name of Mrs. Fred W. Lohr. (*Emery v. Kipp*, 154 Cal. 83, 129 Am. St. 141, 97 Pac. 17, 16 Ann. Cas. 792, 19 L. R. A., N. S., 983.)

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It is necessary, in order to make an objection to the jurisdiction in a direct attack upon the judgment, to set forth in the complaint specifically the facts showing the falsity or bad faith of the affidavit for publication. (*Cargile v. Silsbee*, 148 Cal. 259, 82 Pac. 1044; *Eldred v. White*, 102 Cal. 600, 36 Pac. 944.)

It is necessary to specifically allege the facts constituting the alleged fraud to obtain equitable relief against a judgment claimed to have been procured by fraud. (*King v. Clay*, 34 Ark. 291; *Shufeldt v. Gandy*, 25 Neb. 602, 41 N. W. 553; *McDonald v. Pearson*, 114 Ala. 630, 21 So. 534; *Thompson v. Caddo County Bank*, 15 Okl. 615, 82 Pac. 927.)

"The 'fraud' for which a judgment may be set aside must be actual fraud, involving intentional wrong as distinguished from legal or constructive fraud." (*Wagner v. Beadle*, 82 Kan. 468, 108 Pac. 859.)

BUDGE, J.—This suit is one in equity and is, in effect, to set aside a former judgment between the parties wherein the title of the appellant to lot 33, of block 44, of Crow's Addition to the city of Idaho Falls was, by an action brought by the respondent, quieted in him. Service was had of the summons in said action by publication, and default was taken against the appellant.

The original complaint in this suit was filed on December 5, 1912, and the answer and cross-complaint thereto were filed on April 12, 1913. Subsequently the plaintiff, by leave of the court, filed an amended complaint, to which the defendant filed an answer and cross-complaint, and this cause was tried upon the amended complaint and the answer and cross-complaint.

In her amended complaint the appellant claimed that she was the owner and entitled to the possession of lot 33, block 44, Crow's Addition to the city of Idaho Falls, and that the defendant was asserting an adverse claim thereto.

The facts, as we gather them from the record, are as follows:

Appellant purchased the lot involved in this litigation in 1892 and paid the taxes thereon regularly up to and including

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the year 1904. John Wray was the assessor and collector of Bingham county during that year, and received the taxes from the appellant prior to the date they became delinquent for the year 1904; but in making up his tax-roll, he listed lot 33 in block 48 to the appellant and credited the payment made to him as *ex-officio* tax collector on that lot instead of on lot 33 in block 44, which resulted in the taxes on lot 33, block 44, appearing delinquent. One Danielson succeeded Wray as assessor and collector, and on July 10, 1905, sold lot 33, block 44, the appellant's lot, for delinquent taxes for 1904; Bingham county becoming the purchaser. On November 26, 1907, Bingham county sold the certificate of sale received by it to the respondent for \$2.60. The respondent obtained a tax deed some time during 1908.

The record further discloses that the appellant has paid all of the taxes assessed against lot 33, block 44, Crow's Addition, since 1892, down to and including 1912, except 1905, when it was not assessed, and in 1909, when the collector refused her money on the ground that the taxes were already paid.

When appellant purchased the lot in question she was unmarried, and her name was Mathilda Jahr. Prior to 1904, she married Fred W. Lohr, and her name and address appear upon the assessment-roll of Bingham county for 1904, as "Mrs. F. W. Lohr, residence, Aurora, Ill., 434 Talma street." The lot is described upon that assessment-roll as "lot 33, block 48, Crows [additional]." The name and address of Mrs. F. W. Lohr is also upon the assessment-roll for 1906, 1907 and 1908; but upon each of these last three assessment-rolls lot 33, block 44, Crow's Addition properly appears. The error in the description of the lot appears only for 1904.

On November 16, 1909, the respondent filed an action in the district court of the sixth judicial district in Bingham county, entitled *Bowen Curley v. Henry M. Sanfield, Mathilda Jahr, et al.*, to quiet title to lot 33 in block 44, as well as to other lots which he had purchased in a similar manner. Service was had on Bingham county and on December 4, 1909, the respondent made an affidavit in said action to procure an order for the publication of summons upon the defendants and,

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among other things, recited in said affidavit that Mathilda Jahr could not, after due diligence, be found within the state of Idaho or at all; nor could the plaintiff, after due diligence, ascertain the residence or postoffice address of the said Mathilda Jahr. Order for publication of the *alias* summons was signed by the court on December 6, 1909, based upon the affidavit of respondent, and the *alias* summons was duly published in the "Idaho Register," a semi-weekly newspaper published at Idaho Falls. In due time the default of the appellant was taken, and on February 17, 1910, findings of fact and judgment were signed by the district judge of the sixth judicial district, quieting title in the respondent to lot 33, block 44.

It is admitted that there was no order made for the mailing of a copy of the summons and complaint to the appellant; and we think the record fully establishes the fact that she had no notice of said judgment until December, 1912.

This cause was tried at the September term, 1913, of the district court of the ninth judicial district, before the court without a jury and submitted. The court took the cause under advisement and afterward continued it to the January, 1914, term; and on the 5th day thereof signed his findings of fact and conclusions of law and rendered judgment for the respondent, quieting his title to lot 33, block 44. From that judgment this appeal is taken.

It is conceded, first, that during the three years succeeding the attempted sale of lot 33, block 44, Crow's Addition, the assessor failed to enter the taxes assessed against said lot on the assessment-roll in red ink (sec. 1755, Rev. Codes; *Parson v. Wrble*, 21 Ida. 695, 123 Pac. 638; *Griffith v. Anderson*, 22 Ida. 323, 125 Pac. 218; *Fix v. Gray*, 26 Ida. 19, 140 Pac. 771); second, that neither the assessor nor any of his deputies made or subscribed, in the assessment-book for 1904, the affidavit required by sec. 1727, Rev. Codes; third, that the taxes for 1904 were actually paid by appellant to the tax collector of Bingham county. It is therefore obvious that had the appellant appeared in the original action of *Curley v. Sanfield*, *supra*, that either one of these separate defenses would have

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defeated the right of the respondent to quiet in him the title to lot 33, block 44, Crow's Addition.

We therefore come to the only question involved in this case, viz., the validity of the judgment in the case of *Curley v. Sanfield et al.* And for the purpose of inquiring into the validity of the judgment and in order to determine whether or not the trial court had jurisdiction of this appellant in the case of *Curley v. Sanfield, supra*, we are of the opinion that, under the authorities and in view of the peculiar facts of this case, it is our duty to inquire into the purported facts set out in respondent's affidavit presented to the court to obtain the order for the publication of the *alias* summons.

The affidavit made by respondent for publication of the summons in question states in substance that the defendant, Mathilda Jahr, cannot, after due diligence, be found within the state of Idaho or at all; nor can the plaintiff, after due diligence, ascertain the residence or postoffice address of the said Mathilda Jahr.

The defendant, Mathilda Jahr, as appears from the record, purchased lot 33, block 44, Crow's Addition, in the year 1892 and paid the taxes thereon up to and including 1904, as well as subsequent thereto up to and including 1912, except in 1905 when the property was not assessed and in 1909 when the taxes were refused. And with regard to this refusal of the taxes, we direct attention to 27 Am. & Eng. Ency. of Law, p. 755, which reads: "If the owner of land, or a party having interest therein, in good faith applies to the proper officer for the purpose of paying the tax thereon, and payment is prevented by the mistake or fault of such officer, . . . the attempt to pay is considered, in most jurisdictions as the legal equivalent of payment in so far as to discharge the lien and bar a sale for nonpayment." Thus in *Breisch v. Cox*, 81 Pa. St. 336, 346, the court in dealing with an attempt to pay taxes, observed: "It is an almost universal rule, which substitutes a tender for performance, when the tender is frustrated by the act of the party entitled to performance." Moreover, in case of *Taylor v. Debritz*, 48 Wash. 373, 93 Pac. 528, the court held: "Where plaintiff after purchasing cer-

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tain land applied in good faith to the proper officer to pay the taxes thereon, and payment for one year was not made, because the taxing officer stated that there were no taxes unpaid or delinquent against the land except those which plaintiff had previously paid, a tax deed pursuant to a sale for taxes for the year for which the lands were in fact delinquent was void."

The record title stood in the name of Mathilda Jahr. She held tax receipts properly signed by the various *ex-officio* tax collectors of Bingham county covering all of these years in the name of Mathilda Jahr, up to and including the year 1902. Thereafter the tax receipts, up to and including the year 1912, are in the name of Mrs. F. W. Lohr. In 1903 the tax receipt was made out to Mrs. F. Lohr. In 1904, when the error of the assessor was made and when, for the first and only time the error in description of the property appears, the tax receipt was made out in the name of F. W. Lohr. On the assessment-roll of Bingham county for that year appears the name of Mrs. F. W. Lohr, residence, Aurora, Ill., 434 Talma street and she is there assessed with lot 33, block 48, Crow's Addition, instead of lot 33, block 44, of Crow's Addition. In 1906, when the lot was again assessed, the name of Mrs. Fred Lohr appears upon the assessment-roll of Bingham county, and her residence is given as Aurora, Ill., 434 Talma street; and she is again correctly assessed with lot 33, block 44. On the assessment-roll of Bingham county for 1907 her name and address are given in full and she is assessed with lot 33, block 44; and that same information appears on the assessment-roll for 1908.

It therefore appears that she is assessed with lot 33, block 44, with the one exception of 1904, from the year 1892, down to and including 1912. Upon the stubs of the tax receipts issued to her in the office of the tax collector of Bingham county appears the same information, no doubt, that is contained upon all of the receipts mailed to her at Aurora, Illinois.

During the years 1904, 1906, 1907 and 1908, while the respondent was waiting before, under the statute, he could

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demand his deed from Bingham county, Mrs. Fred W. Lohr was remitting annually to the tax collector of Bingham county the amount of taxes due upon lot 33, block 44, before they became delinquent.

A consideration of the facts above mentioned in connection with respondent's affidavit for publication of the summons leads us to the irresistible conclusion that the court was not fully informed of these facts at the time the order for the publication of the summons was signed. Whether these facts were within the knowledge of the respondent at the time he made the affidavit, he alone knows. However, it is apparent to our minds that had he used the diligence that the law requires, all of these facts would have been known to him. Had he gone, as we believe it was his duty under the law to do, to the assessor and *ex-officio* tax collector of Bingham county, and inquired touching these matters, he no doubt would have been fully informed of the name and address of the owner of lot 33, block 44, Crow's Addition to the city of Idaho Falls.

And under the facts in this case, appellant could not well be expected to do more than conclusively establish the fact that the means of ascertaining her whereabouts were accessible to the respondent, had he used the diligence required under sec. 4145, Rev. Codes, as amended, Sess. Laws 1909, p. 186. She should not be required to produce evidence directly showing the condition of his mind on this subject.

In the case of *Bullock v. Wallace*, 47 Wash. 690, 92 Pac. 675, a case similar to the one here under consideration, the court said: "However regular the tax proceedings may have been upon their face, we could not regard respondents in the light of entire innocence, even were they entitled to interpose such defense here. The existence upon the record of the deed from the tax title grantee was in the nature of a danger signal, warning respondents to look out for obstructions in the stream of title. They ignored the signal, and steered ahead without regard to it. We do not mean to say that the deed from Benton to appellant conveyed actual title; but knowledge of its existence placed respondents in a posi-

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tion differing with regard to good faith from that of the ordinary purchaser in a tax proceeding record which is fair upon its face. But, however fair the tax record may have been, if the taxes were in fact paid, the foreclosure proceedings and the deed thereunder were void."

In the case at bar, the fact that the appellant was paying taxes on lot 33, block 44, during the years of 1906, 1907 and 1908, and had been paying taxes thereon since the year-1892 was a "danger signal" and should have been a warning to respondent sufficient to direct his attention to the record in the office of the assessor and *ex-officio* tax collector of Bingham county, which he disregarded.

Sec. 4145, Rev. Codes, as amended, Sess. Laws 1909, p. 186, was in force at the time of the attempted service by publication upon the defendant of the summons in the case of *Curley v. Sanfield*, *supra*, and provided:

"When the person on whom the service is to be made resides outside of the state, or has departed from the state, or cannot after due diligence be found within the state, or conceals himself therein to avoid the service of summons, and the fact appears by affidavit to the satisfaction of the court in which the suit is pending, or to the judge or to the clerk thereof in vacation, and it also appears by the verified complaint on file that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a necessary or proper party to the action, such court, or judge, or the clerk in the vacation of the court, may make an order for the publication of the summons, or, if the address of the defendant outside of the state is known may make an order that personal service of the summons may be made outside the state in lieu of such publication, and an affidavit setting forth in ordinary and concise language any of the grounds as above set forth upon which the publication of the summons is asked for, shall be sufficient without setting forth or showing what efforts have been made or what diligence has been exerted, in attempting to find the defendant."

We do not understand from this section of the statute that it was not necessary for the respondent to use diligence

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and to make the effort to ascertain the residence of the defendant required under the statute. The mere making of the assertion that after due diligence the defendant could not be found within the state or at all, nor could the plaintiff after due diligence ascertain the residence or postoffice address of the defendant is not a compliance with the statute. The diligence must have been used. And where it appears that there was no diligence used or effort made to ascertain the residence or the postoffice address of the defendant, and that had diligence been used this information would have been ascertained, and by reason of such negligence on the part of the plaintiff a fraud in fact is perpetrated upon the court, the judgment is void.

In the case of *Dunlap v. Steere*, 92 Cal. 344, 27 Am. St. 143, 28 Pac. 563, 16 L. R. A. 361, it was said: "We think the plaintiff is entitled to the relief which he asks, not only upon authority, but upon the plainest principles of justice. 'In general, it may be stated that in all cases where, by accident or mistake or fraud or otherwise, a party has an unfair advantage in proceedings in a court of law, which must necessarily make that court an instrument of injustice and it is therefore against conscience that he should use that advantage, a court of equity will interfere, and restrain him from using the advantage which he has thus improperly gained.' (Story, Eq. Jur., sec. 885.) In order to justify the application of this rule, it must appear not only that the judgment against which relief is sought is unjust and unconscionable in itself, but that the person against whom it was rendered was not guilty of negligence in omitting to make his defense in the original action."

In the case of *Keister v. Rankin*, 34 App. Div. 288, 54 N. Y. Supp. 274, the court said: "It is never too late to do justice. When the ends of justice require that a new trial should be had, the supreme court may act, although the case may have been to the court of appeals and disposed of there." And in following this doctrine in the case of *Nugent v. Metropolitan St. Ry. Co.*, 46 App. Div. 105, 61 N. Y. Supp. 476, the court observed: "The court is constituted to enforce legal rights

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and redress legal wrongs, and whenever it is made to appear, as it is in this case, that a wrong has been perpetrated, it never hesitates to exercise the power which it has, unless to do so would do a greater injury than to refuse to exercise it." (See, also, *Parsons v. Weis*, 144 Cal. 410, 77 Pac. 1007.)

In the case under consideration, the appellant paid the taxes due upon her lot each and every year before the same became delinquent, from 1892, down to and including 1912, with two exceptions, namely, in 1905 when there was no levy made, and in 1909 when the taxes were returned to her and when, without her knowledge, respondent obtained a deed.

The sale of her lot was based upon the failure to pay her taxes in 1904, when in truth and in fact the taxes were paid. Just as soon as the money was received by the duly authorized officer, the *ex-officio* tax collector of Bingham county, it was a payment of her taxes to Bingham county, of which Bonneville was then a part. The county had no lien upon her property for failure to pay taxes. When the county issued the certificate of sale to itself, it was not based upon any lien legally created against the property of the appellant. When the county assigned its certificate of sale and subsequently issued its deed to the respondent in this case, there was a total failure of consideration. Neither the certificate nor the deed carried title.

It was an unjust and unconscionable act so far as it affected the appellant. It deprived her of her property without due process of law when she had complied with each and every provision of the law affecting the payment of her taxes. She was penalized for her compliance with the law, and was made to suffer by reason of the negligence and carelessness of a public officer. (See *Burke v. Brown*, 148 Mo. 309, 49 S. W. 1023.)

As soon as she ascertained that her property had been sold for taxes, she immediately made application to the board of county commissioners to have the sale vacated and the deed canceled. It clearly appears that she was not aware of the bringing of the suit to quiet title, viz., the case of *Curley v. Sanfield*, *supra*, until December, 1912. She was therefore

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guilty of no negligence in omitting to make her defense in the original suit, because she was not served with summons, constructive or otherwise, and had no notice of the pendency of such action. On the contrary, she was diligent, under the circumstances, in seeking to protect her rights immediately upon ascertaining that judgment had been rendered against her.

The case of *Hayes v. Los Angeles County*, 99 Cal. 74, 33 Pac. 766, we think is in point upon the proposition that where the taxes have been actually paid by the owner upon his property, but have been erroneously credited, the county has no right nor power to sell or in any manner affect or encumber the land by a sale thereof. The lien of the tax is gone; and as the implied right which, in the event of a failure to redeem, ripens into a title in the purchaser, has no existence, there is no consideration for the purchase money; and he who has paid it ought in justice to be entitled to recover it back.

From what has been said it follows that the court erred in its findings of fact No. 12 and its conclusions of law based thereon, to the effect that all of the defendants in the case of *Bowen Curley v. Henry M. Sanfield, Mathilda Jahr et al.*, were duly and regularly served with summons; that the court acquired jurisdiction over all those defendants; and that the plaintiff was the owner of lot 33, block 44, Crow's Addition to the original town of Eagle Rock, now city of Idaho Falls, Bingham county, and entitled to the possession thereof.

The trial court is hereby directed to vacate and set aside the judgment entered in this action in favor of respondent and to enter up judgment in favor of appellant, quieting title in her to lot 33, block 44, Crow's Addition to the city of Idaho Falls. Judgment for costs is awarded in favor of appellant.

Sullivan, C. J., and Morgan, J., concur.

Points Decided.

(October 2, 1915.)

STATE, to and for the Use and Benefit of **O. W. ALLEN**
et al., Respondents, v. **TITLE GUARANTY AND**
SURETY COMPANY OF SCRANTON, PENNSYLVANIA, a Corporation, and **VERNON W. PLATT**,
Appellants.

[152 Pac. 189.]

JURISDICTION—AMOUNT IN CONTROVERSY—PARTIES—CAUSES OF ACTION
—MISJOINDER—PUBLIC OFFICERS—POWERS AND DUTIES—DISCRE-
TIONARY POWERS—CONSTITUTIONAL LAW—ACTION PREMATURELY
BROUGHT—INTEREST.

1. Where a state, as trustee of an express trust, sues to recover sums which, in the aggregate, exceed \$3,000, exclusive of interest and costs, for and on behalf of certain depositors in a bank whose deposits have been lost as a result of the failure of the bank commissioner to perform his official duty and where the claim of no individual depositor amounts to \$3,000, although diversity of citizenship exists between the parties to the action, a petition for removal to the federal court was properly denied.

2. In such case the state was plaintiff for the use and benefit of the depositors, and properly united the several causes of action stated in the complaint, since they arose out of contracts, and the causes of action so united affect all parties to the suit and did not require different places of trial. The demurrer to the complaint upon the ground of misjoinder of parties plaintiff and misjoinder of causes of action was properly overruled.

3. Where power is given by statute to a public officer in permissive language—as that he *may* do a certain thing,—the language used will be regarded as peremptory if the public interest or individual rights require that it should be so regarded.

4. The law invests a bank commissioner with discretion while he is making his investigation and up to the point where he reaches the conclusion and becomes satisfied that the bank has unlawfully refused to pay its depositors and has become insolvent, but at this point his discretion ends and it becomes his mandatory duty to close it, a duty the failure to perform which renders him and the surety upon his official bond liable to depositors who lose their money as a direct result thereof.

5. The provisions of secs. 73 and 74, chap. 124, Sess. Laws 1911, *held*, not to be in contravention of the 14th amendment of the con-

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stitution of the United States nor of sec. 13, art. 1, nor secs. 2 and 13, art. 5, of the constitution of Idaho.

6. The contention that an action has been prematurely brought cannot be successfully made for the first time upon appeal, but must be made first in the trial court.

7. In cases of this kind, where the amount claimed is definite and certain or can be readily ascertained—of a character not wholly unliquidated—in the absence of a stipulation in the bond to the contrary and in the absence of a controlling statutory provision, interest begins to accumulate as against the surety on the bond at the same time as against the principal obligor. If a breach in the conditions of the bond creates a debt on the part of the principal, it becomes the debt of the surety as well, and if it is unnecessary to make demand upon the one in order to start the interest period, none need be made upon the other.

8. Where a statute imposes a duty upon one for the protection and benefit of others, and does not invest him with discretionary power in the matter, if he neglects to perform the duty, he is liable to those for whose protection the statute is enacted for any damage resulting proximately from his neglect, whether he be actuated by malice, a corrupt motive or otherwise.

APPEAL from the District Court of the Third Judicial District for Ada County. Hon. Charles P. McCarthy, Judge.

Action on official bond. Judgment for plaintiff. *Affirmed.*

John F. Nugent, S. H. Hays and P. B. Carter, for Appellant.

Petition for removal to the United States court should have been granted.

“When several plaintiffs unite to enforce a single title or right in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount.” (*Troy Bank v. G. A. Whitehead & Co.*, 222 U. S. 39, 32 Sup. Ct. 9, 56 L. ed. 81; *Cowell v. City Water Supply Co.*, 121 Fed. 53, 55, 57 C. C. A. 393; *Shields v. Thomas*, 17 How. 93, 15 L. ed. 53; *Marshall v. Holmes*, 141 U. S. 589, 12 Sup. Ct. 62, 35 L. ed. 870; *Davies v. Corbin*, 112 U. S. 36, 5 Sup. Ct. 4, 28 L. ed. 627.)

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The mere presence on the record of the state as a party plaintiff will not defeat the jurisdiction of the federal court if it appears that the state had no real interest in the controversy. (*Ex parte Nebraska*, 209 U. S. 436, 28 Sup. Ct. 581, 52 L. ed. 876.)

There is no warrant whatever in the statute or in the practice for making the state a party in a suit of this character. (*United States v. Shoup*, 2 Ida. 493, 21 Pac. 656; *Baker v. Bartol*, 7 Cal. 551; *Mendocino Co. v. Lamar*, 30 Cal. 628; *Mendocino Co. v. Morris*, 32 Cal. 145; *Heisen v. Smith*, 138 Cal. 216, 94 Am. St. 39, 71 Pac. 180.)

The demurrer to the complaint should have been sustained upon the ground of a misjoinder of parties plaintiff and of causes of action. (Pomeroy's Code Remedies, sec. 377; *Creer v. Bancroft L. & Irr. Co.*, 13 Ida. 407, 90 Pac. 228; *Benson v. Battey*, 70 Kan. 288, 78 Pac. 844, 3 Ann. Cas. 283.)

Administrative officers, such as bank commissioners, exercising quasi-judicial functions, cannot be questioned as to their judgments in matters which by the statute they are called upon to decide. (Mechem on Public Officers, sec. 640; 29 Cyc. 1444; 2 Cooley on Torts, p. 797; Throop on Public Officers, secs. 720, 721.)

The surety was liable for interest only from the time of the making of the demand. (*City of Dickinson v. White*, 25 N. D. 523, 143 N. W. 754, 49 L. R. A., N. S., 362, and cases there cited.)

Under plaintiffs' construction of the statute, no notice or hearing on the question of insolvency is provided for. This is not due process of law. (*Chicago, Milwaukee & St. Paul Ry. Co. v. State of Minnesota*, 134 U. S. 418, 10 Sup. Ct. 462, 33 L. ed. 970; 28 Harvard Law Review, 198.)

The action is prematurely brought. There can be no recovery until the amount of the loss is ascertained. (*People v. Supervisors of Livingston County*, 17 N. Y. 486.)

J. H. Peterson, Atty. Genl., and Martin & Cameron, for Respondent.

In order for a case to be removable on the grounds of diversity of citizenship, the controversy must be between citi-

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zens of different states. A state is not a citizen within the meaning of the removal acts. (*Stone v. South Carolina*, 117 U. S. 430, 6 Sup. Ct. 799, 29 L. ed. 962; *Buxton v. Pennsylvania Lumber Co.*, 221 Fed. 718.)

This bond was given for the benefit and protection of bank depositors. (*State v. American Surety Co.*, 26 Ida. 652, 145 Pac. 1097.)

The state is the trustee of an express trust within the meaning of sec. 4092, Rev. Codes, and the suit was properly brought in the name of the state. (*People v. Stacy*, 74 Cal. 373, 16 Pac. 192.)

This court has heretofore said in *Bellevue State Bank v. Coffin*, 22 Ida. 210, 125 Pac. 816, that it is a fraud upon depositors for a bank known to be insolvent to continue running and receiving depositors' money.

By the Session Laws of 1911, chap. 124, sec. 36, p. 398, and sec. 71, p. 407, every officer of a bank is liable civilly to every depositor who suffers damage, when such officers accept deposits knowing that the bank is insolvent. Moreover, by sec. 71, any owner or officer of a bank who shall receive deposits knowing that a bank is insolvent shall be deemed guilty of a felony. This law in effect makes it the absolute, imperative, mandatory duty of the owners and officers of a bank to close a bank and stop receiving deposits when they know the bank is insolvent. Can it be argued in the face of such provisions that it is discretionary with a bank commissioner to allow a bank which he knows and is satisfied is insolvent to continue running? (*Nathan v. Uhlman*, 101 App. Div. 388, 92 N. Y. Supp. 13; *Cassidy v. Uhlmann*, 170 N. Y. 505, 63 N. E. 554; *State v. Beach*, 147 Ind. 74, 43 N. E. 949, 46 N. E. 145, 36 L. R. A. 179; *State v. Cadwell*, 79 Iowa, 432, 44 N. W. 700; *Parrish v. Commonwealth*, 136 Ky. 77, 123 S. W. 339; *State v. Cramer*, 20 Ida. 639, 119 Pac. 30; *Baxter v. Coughlan*, 70 Minn. 1, 72 N. W. 797.)

"Where power is given to public officers, whenever public or individual right calls for its exercise, the language used, though permissive in form, is in fact peremptory. In all such cases it is held that the intent of the legislature was not

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to devolve a mere discretion, but to impose a positive and absolute duty." (*State v. American Surety Co.*, *supra*; *Supervisors v. United States*, 4 Wall. 435, 18 L. ed. 419; *Hayes v. Los Angeles Co.*, 99 Cal. 74, 80, 33 Pac. 766; *State v. Kent*, 4 N. D. 577, 591, 62 N. W. 631, 635, 27 L. R. A. 686; *United States ex rel. Siegel v. Thoman*, 156 U. S. 353, 15 Sup. Ct. 378, 39 L. ed. 450; *Woolridge v. McKenna*, 8 Fed. 650, 662; *United States v. De Visser*, 10 Fed. 645; *Ralston v. Crittenden*, 13 Fed. 508, 512, 3 McCrary, 344.)

After the bank commissioner became satisfied that the bank was insolvent it became mandatory upon him to perform the ministerial act of taking charge of the bank. (*Flournoy v. City of Jeffersonville*, 17 Ind. 169, 79 Am. Dec. 468.) Sureties on official bonds are liable for negligence or malfeasance of their principal in the performance of acts which are done *virtute officii*. (29 Cyc. 1455; Throop on Public Officers, secs. 724-726; *Myers v. Colquitt* (Tex. Civ. App.), 173 S. W. 993.)

After the performance of a discretionary duty an officer may then be called upon, in the same statute, to perform a ministerial duty. (29 Cyc. 1443; *Speer v. Stephenson*, 16 Ida. 707, 102 Pac. 365; *Grider v. Tally*, 77 Ala. 422, 54 Am. Rep. 65; *State v. Chase*, 5 Ohio St. 528; *Merritt v. McNally*, 14 Mont. 228, 36 Pac. 44; *Utah Assn. of Credit Men v. Bowman*, 38 Utah, 326, Ann. Cas. 1913B, 334, 113 Pac. 63.)

The deposits for which this suit is brought were all due and payable on December 19, 1911. (2 Michie on Banks and Banking, p. 1323.)

"The insolvency of a bank or a stoppage of payment dispenses with the necessity of a demand and all deposits become due and payable forthwith. A demand need not be shown in an action by a depositor against a bank which has failed, where it affirmatively appears that it would have been fruitless had it been made." (*Thompson v. Union Trust*, 130 Mich. 508, 90 N. W. 295; *Colton v. Drivers' etc. Assn.*, 90 Md. 85, 78 Am. St. 431, 45 Atl. 23, 46 L. R. A. 388; *Scott v. Armstrong*, 146 U. S. 499, 13 Sup. Ct. 148, 36 L. ed. 1059; *Queenan v. Palmer*, 117 Ill. 619, 7 N. E. 470, 613;

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Armstrong v. Warner, 10 Ohio Dec. 434; *Armstrong v. Law*, 11 Ohio Dec. 461; *Wheeler v. Commercial Bank*, 5 Ida. 15, 46 Pac. 830.)

An objection that a suit is prematurely brought cannot be urged for the first time on appeal. (*International Harvester Co. v. Elfstrom*, 101 Minn. 263, 118 Am. St. 626, 112 N. W. 252, 11 Ann. Cas. 107, 12 L. R. A., N. S., 343; *Atkinson v. Singer Mfg. Co.*, 35 N. Y. Supp. 117; *Nicholson v. Hendricks*, 22 La. Ann. 511; *Brownlee v. Marion Co.*, 53 Iowa, 487, 5 N. W. 610; *Williams v. Smith* (Tex.), 24 S. W. 1115; *Logan v. Slade*, 28 Fla. 699, 10 So. 25; *Blount v. McNeill*, 29 Ala. 473; *Johnson v. Meyer*, 54 Ark. 442, 16 S. W. 123; *Green v. Demoss*, 10 Humph. (Tenn.) 371.)

Issues not raised by the pleadings and presented to the trial court will not be considered on appeal. (*Müller v. Donovan*, 11 Ida. 545, 83 Pac. 608.)

MORGAN, J.—This action was commenced by the state of Idaho to recover on the official bond of Vernon W. Platt, former bank commissioner of Idaho, and the Title Guaranty and Surety Company of Scranton, Pennsylvania, his surety, for the use and benefit of O. W. Allen and 218 other depositors in the Boise State Bank, Limited, a separate cause of action being stated in the complaint on behalf of each of said depositors. The amount in dispute in each cause of action is separate and distinct from every other cause of action and none of the parties claimed any interest whatever in the demand of any other depositor. In none of the causes of action does the state, as a trustee of an express trust, under the statute, ask for any individual depositor for as much as \$3,000, exclusive of interest and costs, the sum asked for each depositor being the amount of the balance due on his deposits between October 27, 1911, when it is alleged said bank commissioner, Platt, concluded an examination of the bank, and December 19, 1911, when he closed it.

It is alleged in the complaint that upon making his examination of the bank on the 25th, 26th and 27th of October, 1911, Platt became satisfied and knew its capital was impaired

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and reduced below the amount required by law and below the amount certified to the commissioner as paid in, and that he failed, neglected and omitted to require its officers to make good such impairment or deficiency; that he became satisfied and knew it had unlawfully refused to pay one of its depositors in accordance with the terms on which the deposit was received; that he became satisfied and knew the bank was insolvent and that he failed, neglected and omitted to take charge of it and wind up its affairs as by law provided until the 19th of December, 1911. That by reason of his failure to perform his official duty in this behalf the persons for whose benefit this action was brought, believing the bank to be solvent, deposited therein various sums of money in amounts set out in the complaint.

The trial resulted in a verdict and judgment against the appellants, which judgment was rendered in favor of each of the beneficiaries named, for the several amounts found to be due them, the aggregate amount of which was \$30,240.98. From said judgment and an order denying a new trial this appeal is taken.

The appellants, in the preparation of their brief, have failed to conform to rule 45 of the rules of practice, in that it does not contain a distinct enumeration of the several errors relied on. However, we will undertake to dispose of the points presented for our consideration.

The appellants filed a petition for removal of the cause from the state court to the district court of the United States and alleged therein, among other matters, that the amount in dispute exceeded the sum or value of \$3,000, exclusive of interest and costs; that the controversy was between citizens of different states; that the state of Idaho was but a formal or nominal plaintiff, and that the parties for whose use and benefit the suit was brought were citizens of Idaho; that the defendant, Title Guaranty and Surety Company of Scranton, Pennsylvania, was a citizen of Pennsylvania and that the defendant Platt was a citizen of Oregon. The petition for removal was denied and appellants contend that error was thereby committed.

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It is true the amounts in the aggregate of the several separate causes of action, exclusive of interest and costs, are in excess of \$3,000, and it is also true, and it appears from the complaint, that the money claimed to be due to no individual depositor amounted to that sum.

A number of authorities are cited by appellants in support of their contention that the cause should have been removed to the federal court, but it is believed they are all readily distinguishable from cases of this kind. What appears to be the correct rule is stated in case of *Troy Bank v. G. A. Whitehead & Co.*, 222 U. S. 39, 32 Sup. Ct. 9, 56 L. ed. 81, as follows:

“When two or more plaintiffs, having separate and distinct demands, unite for convenience and economy in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount; but when several plaintiffs unite to enforce a single title or right, in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount.” (See, also, *Putney v. Whitmire*, 66 Fed. 385; *Gibson v. Shufeldt*, 122 U. S. 27, 7 Sup. Ct. 1066, 30 L. ed. 1083; *Woodside v. Beckham*, 216 U. S. 117, 30 Sup. Ct. 367, 54 L. ed. 408; *Farmers' Loan & Trust Co. v. Waterman*, 106 U. S. 265, 1 Sup. Ct. 131, 27 L. ed. 115.)

There is in this action, in one sense, a unity of interest, which lies in the fact that all of the causes of action are upon the same bond and for the same breach thereof and on the same default or neglect of duty on the part of the bank commissioner, and the bond runs to the state of Idaho to and for the use and benefit of all parties who are aggrieved by the breach thereof, but the depositors in the bank had separate and distinct demands against appellants, none of which amounted to enough to confer jurisdiction upon the federal court. Each of them might have brought a separate action, but it was not necessary for them to do so. The bond was given to and was made payable to the state of Idaho, the claims were united for convenience and economy, and suit was brought in the name of the state as trustee of an express trust.

Therefore we conclude that the claims cannot be aggregated to make the requisite amount for federal jurisdiction.

Secs. 295 and 296, Rev. Codes, provide:

“Sec. 295: Every official bond executed by any officer pursuant to law is in force and obligatory upon the principal and sureties therein to and for the state of Idaho, and to and for the use and benefit of all persons who may be injured or aggrieved by the wrongful act or default of such officer in his official capacity, and any person so injured or aggrieved may bring suit on such bond, in his own name, without an assignment thereof.”

“Sec. 296: No such bond is void on the first recovery of a judgment thereon; but suit may be afterward brought, from time to time, and judgment recovered thereon by the state of Idaho, or by any person to whom a right of action has accrued, against such officer and his sureties, until the whole penalty of the bond is exhausted.”

Sec. 4092, Rev. Codes, provides:

“An executor, or administrator, or trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the persons for whose benefit the action is prosecuted. A person with whom or in whose name a contract is made for the benefit of another, is a trustee of an express trust, within the meaning of this section.”

If the other view be taken to the effect that the state is the real party in interest and the amounts could be aggregated for the purpose of federal jurisdiction, the jurisdiction of the federal court would be lacking as to diverse citizenship, since where the state is a party the case is not removable from a state to a federal court on the ground of diverse citizenship. (*State v. South Carolina*, 117 U. S. 430, 6 Sup. Ct. 799, 29 L. ed. 962.)

Where it appears that the state is a formal or nominal plaintiff only, then the citizenship of the state is not controlling as to federal jurisdiction. It is the citizenship of the real parties in interest that controls.

Appellants also contend that their demurrer should have been sustained upon the ground of misjoinder of parties plaintiff and misjoinder of causes of action, in that no joint

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injury was shown to all the plaintiffs and no joint interest existed in the causes of action; that no cause of action whatever was started on behalf of the state of Idaho.

What has already been said disposes of this contention. There could be no misjoinder of parties plaintiff, for the state alone was plaintiff for the use and benefit of the depositors. There was no misjoinder of causes of action, for sec. 4169, Rev. Codes, as amended by chap. 23, Sess. Laws, 1913 (p. 92), provides that the plaintiff may unite several causes of action in the same complaint where they arise out of contracts, express or implied, if the causes of action so united affect all the parties to the action and do not require different places of trial. While the state of Idaho was not beneficially interested, financially, in any of the causes of action in the complaint stated, it was the proper party plaintiff under sec. 4092, above quoted, for the use and benefit of the depositors in the bank. The demurrer was properly overruled.

At the close of the respondents' case in chief appellants moved for a nonsuit, and at the close of the testimony upon the part of both parties a motion for a directed verdict in their favor was made upon the following grounds:

"1. That the evidence was insufficient to show liability on the part of the defendants.

"2. That there was no proof of loss or injury on the part of the plaintiffs caused by the defendant Platt for which the surety company would be liable.

"3. That there was no evidence that Platt became satisfied that the capital of the bank was impaired, or that the bank was insolvent, or that he neglected any official duty in respect to the bank.

"4. That the closing of the bank was a matter of discretion or judgment and no recovery could be had against the defendant Platt in such a matter, and, therefore, no recovery against the surety company.

"5. That there was no proof that the failure to close the bank arose from any corrupt motive or from malice, or any improper thing on the part of the defendant Platt.

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“6. That the complaint does not state a cause of action and no proof beyond the complaint has been offered.”

Their motions were denied by the court and appellants contend that the rulings thereon were erroneous. This contention seems to arise from a misinterpretation of the law.

This action is based upon the provisions of chap. 124 (p. 386), Sess. Laws 1911. It becomes the duty of the bank commissioner, under sec. 72 of that chapter, upon being satisfied that the capital of any bank or trust company is impaired or reduced below the amount required by law or the articles of incorporation or below the amount certified to the commissioner as paid in, to require such bank or trust company to make good such impairment or deficiency. If any bank or trust company shall refuse or fail for thirty days after written notice to make good such impairment of or deficiency in its capital, the bank commissioner is authorized and empowered to take charge of its affairs and to wind up its business under the direction of the court in the judicial district in which the bank or trust company is located. Secs. 73 and 74 of said chapter provide:

“Sec. 73. On becoming satisfied that any bank or trust company has unlawfully refused to pay its depositors in accordance with the terms on which such deposits were received, or that any bank or trust company has become insolvent, the bank commissioner may forthwith take possession of the books, records and assets of every description of such bank or trust company and hold the same, and no action or proceeding shall be commenced or maintained for the recovery of the possession of said books, records and assets, or to require a lien thereon except in the proceedings of the district court having jurisdiction over the winding up of the affairs of said bank or trust company. The bank commissioner shall at once proceed to collect all debts, dues and claims, and to sell or compound all doubtful debts, and to sell all real and personal property, on such terms as the court shall direct. Said bank commissioner shall pay over all money, by him received under the order of the court.”

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"Sec. 74. To carry out the provisions of sections 72 and 73, the bank commissioner is hereby authorized, and it is made his duty, to take charge of such bank or trust company personally or by his deputy, or by a special deputy appointed by the commissioner for that specific purpose; and the person so taking charge of the affairs of any such bank or trust company shall give a good and sufficient bond to be approved by the court. All expenses incident to such duties as are hereby imposed, including a per diem not to exceed ten dollars (\$10), shall be paid under the order of the court out of the assets of the bank or trust company whose affairs are being administered, and the moneys so received shall, after providing for the compensation of a special deputy and all incidental expenses, be turned into the state treasury. The compensation of a special deputy, as herein provided for, shall not exceed that allowed regularly appointed deputies connected with the banking department."

It readily appears that if the capital of a bank is found to be impaired and its depleted condition does not amount to insolvency, it becomes the duty of the commissioner to give the notice provided for in sec. 72, but if he should become satisfied that it has unlawfully refused to pay its depositors or that it has become insolvent it is his duty, although the law says he may do so, to forthwith take possession of its books, records and assets as provided for in sec. 73.

Where power is given by statute to public officers in permissive language—as that they *may* do a certain thing—the language used will be regarded as peremptory if the public interest or individual rights require that it should be so regarded. (*Supervisors v. United States*, 4 Wall. 435, 18 L. ed. 419; *Hayes v. County of Los Angeles*, 99 Cal. 74, 33 Pac. 766; *State v. Kent*, 4 N. D. 577, 62 N. W. 631; *Ralston v. Crittenden*, 13 Fed. 508, 3 McCrary, 344.)

There was abundant evidence to justify the jury in reaching the conclusion that on October 27, 1911, Platt was satisfied the bank was insolvent, and it is undisputed that he did not take possession of its books, records and assets until December 19th following; also that in the meantime the persons

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for whose use and benefit this action was brought deposited their money therein and that a considerable part of it was lost.

The law invests the bank commissioner with discretion while he is making his investigation and up to the point where he reaches the conclusion and becomes satisfied that the bank has unlawfully refused to pay its depositors or has become insolvent, but at this point his discretion ends and it becomes his mandatory duty to close it, a duty the failure to perform which renders him and the surety upon his official bond liable to depositors who lose their money as a direct result thereof. (*State v. American Surety Co.*, 26 Ida. 652, 145 Pac. 1097.)

In their motion for a directed verdict appellants also raised the question of the validity of sec. 73, above quoted. They contend that the law under consideration contemplates that a court proceeding must first be instituted by the bank commissioner before he takes possession of the books, records and assets of a bank or trust company found by him to be insolvent or which has unlawfully refused to pay its depositors; that the theory of respondents is, in effect, that it is the duty of the bank commissioner upon becoming satisfied of one or more of the above-mentioned facts to immediately take charge without instituting a proceeding in court to procure judicial authority so to do. It is appellants' further contention that if said sections 72 and 73 are construed to authorize the commissioner to seize the property and wind up the affairs of the bank without any judicial proceedings, then these sections are in violation of the 14th amendment of the constitution of the United States and of sec. 13, art. 1, and secs. 2 and 13, art. 5, of the constitution of Idaho. We are not in accord with appellants' contention. Clearly, sec. 72 of the act in question contemplates that the bank commissioner shall, under the circumstances described therein, act under the direction of the district court. It is clear that secs. 73 and 74 contemplate that under circumstances described in sec. 73 he shall first take charge of the bank and then proceed in the district court to wind up its affairs.

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It appears from the record in this case that Platt did neither of these things, but permitted the bank, without interference upon his part, although he knew it to be in an insolvent condition, to continue business for a period of a month and twenty-three days and to receive deposits of the persons upon whose behalf this action was prosecuted.

Appellants urge that since it appears there may and probably will be other moneys distributed to the creditors of the bank when its assets can be realized upon, that this action is prematurely brought and cannot be maintained until the loss of each depositor has been determined after the affairs of the bank have been wound up. It does not appear that this contention was made in the district court and the question cannot be raised for the first time upon appeal. (*Atkinson v. Singer Mfg. Co.*, 14 Misc. 630, 35 N. Y. Supp. 117; *Logan v. Slade*, 28 Fla. 699, 10 So. 25; *Johnson v. Meyer*, 54 Ark. 442, 16 S. W. 123.) Furthermore, should additional funds arise from the disposal of such assets as still remain in the hands of the receiver, the surety company, upon payment of the judgment, may be subrogated to the rights of the persons in whose behalf this action is brought.

Appellants complain that the judgment includes interest from the date of closing the bank and that interest should only be allowed as against the surety from the date of demand upon it. It is alleged in the complaint and admitted in the answer that it would have been useless and vain to have demanded payment of the claims here sued upon from Platt; that he would have refused to pay and was unable to do so; that a demand was made upon the surety for payment and was refused, but no date of demand is fixed and none is shown in the evidence.

It is contended that the following instruction given by the trial judge is erroneous:

"If you find for the plaintiff on any of the causes of action, the measure of damages will be the amount deposited by any of the parties beneficially interested between the time when you find that the defendant Platt became satisfied that the bank was insolvent or had failed to pay its depositors in

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accordance with the terms of their deposits, and failed to close the bank, if you so find, and the time when the bank was closed, minus any amount which you find such depositors have received as a dividend, or drew out before the bank closed, with interest upon such amount in the sum of 7% per annum from the time of the respective deposits.”

There is error in the instruction above quoted in that it contemplates the collection of interest upon the amount of each deposit made between the date Platt should have closed the bank and the date he did close it from the time of the deposit. Interest is only allowable from the date the bank was closed. This error was cured by the verdict, for it appears that the jury allowed interest upon these deposits from the date of the closing of the bank instead of from the dates the deposits were made.

There is lack of harmony among the authorities as to the time interest begins to run against the surety upon a bond. It is decided in some cases that a surety is not liable for interest prior to demand made for payment, and that in the absence of such demand the interest period commences with the filing of the action to recover the principal debt. Other cases hold that interest may be allowed against the surety from the date of the breach in the conditions of the bond, even though by so doing the judgment exceeds the amount specified in the bond as the penalty thereof. In this case the amount of the judgment is less than the penalty of the bond, so that question does not arise here.

The reasonable rule seems to be that in cases of this kind where the amount of the claim is definite and certain or can be readily ascertained—of a character not wholly unliquidated—in the absence of a stipulation in the bond to the contrary and in the absence of a controlling statutory provision, interest begins to accumulate as against the surety at the same time as against the principal obligor. If a breach in the conditions of a bond creates a debt on the part of the principal, it becomes the debt of the surety as well, and if it is unnecessary to make demand upon the one in order to start the interest period, none need be made upon the other.

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(*Clark v. Wilkinson*, 59 Wis. 543, 18 N. W. 481; *Whereatt v. Ellis*, 103 Wis. 348, 74 Am. St. 865, 79 N. W. 417; *Thomassen v. Hall Co.*, 63 Neb. 777, 89 N. W. 389, 57 L. R. A. 303; *Lumber Co. v. Peterson & Sampson*, 124 Iowa, 599, 100 N. W. 550.)

Each depositor was entitled to receive from the bank on the date it suspended business the full amount of the balance due on his deposit made subsequent to October 27, 1911, and is entitled to interest thereon at the rate of 7% per annum from the date of its suspension until paid. A depositor has exactly the same right to his interest under these circumstances as he has to his principal, and the loss of both principal and interest, due to the failure of the bank commissioner to discharge his duty, are elements of damage of which his failure is the proximate cause and are covered by his official bond. The amounts of the deposits were definite and certain, and tender of payment might have been made by Platt or his surety immediately upon the failure of the bank, in which event no interest would have accumulated.

Complaint is made that the court refused to give to the jury certain instructions asked for by appellants; that the instructions given did not clearly state the law, particularly with respect to the intent and motive which actuated Platt in neglecting and refusing to close the bank when he found it to be insolvent. We have carefully examined these instructions and find no error therein, except the one above quoted, which, as heretofore indicated, was cured by the verdict. Instructions V and VI contain such a clear statement of the law relative to the duty of a bank commissioner in cases of this kind that they will be here quoted:

“V. Whenever a statute imposes certain duties upon an executive officer like a bank commissioner, and directs that he shall use his discretion in passing upon certain matters, he is not liable for a mere mistake in judgment or opinion committed by him in exercising such discretion. Accordingly, if the bank commissioner in the exercise of his discretion shall merely make a mistake in passing judgment upon the question of whether or not the capital of a bank was impaired

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and reduced below the amount required by law, or upon the question as to whether or not the bank had unlawfully refused to pay a depositor in accordance with the terms of his deposit, or upon the question as to whether said bank had become insolvent, such bank commissioner would not be liable for such mistake in judgment, no matter what might be the consequences.

“VI. However, if upon exercising his discretion and using his own judgment, the bank commissioner of the state becomes satisfied in his own mind that any bank or trust company has unlawfully refused to pay its depositors in accordance with the terms of their deposits, or that such bank has become insolvent, it becomes his duty to forthwith take possession of the books, records and assets of every description of such bank and hold the same, and to collect all debts, dues and claims and sell or compound all doubtful debts and to sell all real and personal property on such terms as the court of said judicial district shall direct.”

Where a statute imposes a duty upon one for the protection and benefit of others and does not invest him with discretionary power in the matter, if he neglects to perform the duty he is liable to those for whose protection the statute was enacted for any damage resulting proximately from his neglect, whether he be actuated by malice, a corrupt motive or otherwise. (*Baxter v. Coughlan*, 70 Minn. 1, 72 N. W. 797; *Throop on Public Officers*, sec. 724.)

In case of *Amy v. Supervisors*, 11 Wall. 136, 20 L. ed. 101. Mr. Justice Swayne, delivering the opinion of the supreme court of the United States, said:

“The rule is well settled that where the law requires absolutely a ministerial act to be done by a public officer, and he neglects or refuses to do such act, he may be compelled to respond in damages to the extent of the injury arising from his conduct. There is an unbroken current of authority to this effect. A mistake as to his duty and honest intention will not excuse the offender.”

It follows that the surety upon the official bond of such officer given to secure the faithful performance of his duty is

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also liable. (*People v. Gardner*, 55 Cal. 304; *People v. Smith*, 123 Cal. 70, 55 Pac. 765; *State v. American Surety Co.*, *supra*.)

We find no reversible error in the record, and the judgment of the trial court is accordingly affirmed. Costs are awarded to the respondents.

Budge, J., concurs.

(October 2, 1915.)

CITY OF TWIN FALLS, Respondent, v. GEORGE E. HARLAN, Appellant.

[151 Pac. 1191.]

CITY ORDINANCE—NUISANCE—DITCH IN STREET—COVERING OF—RIGHT OF WAY FOR DITCH—EXTENSION OF CITY LIMITS—AUTHORITY OF CITY COUNCIL—ESTOPPEL.

1. Where a ditch is constructed under a contract with the state to reclaim certain lands included in a Carey Act Irrigation project, and thereafter a town or city extends its limits so that one of the streets of such extension is so platted as to include such ditch, and thereafter the city council passes an ordinance requiring such ditch to be covered and declaring it to be a nuisance if not covered, such ordinance *held* invalid when applied to the ditch in question.

2. *Held*, that the city of Twin Falls as a municipality of the state has not the power or authority to declare a ditch constructed under the laws and supervision of the state a nuisance.

3. Under the provisions of sec. 3659, Rev. Codes, nothing which is done or maintained under the express authority of the statute can be deemed a nuisance.

4. Where a ditch has been constructed and operated in accordance with the law, it is not a nuisance, and can only become one by reason of the manner in which it has been maintained and operated; and the fact that a municipality subsequently extends a street along and includes in it the right of way for such ditch does not convert such ditch into a nuisance.

5. Because a city fails to perform a duty that devolves upon it, a person cannot be punished for a condition resulting from such nonperformance.

Argument for Appellant.

6. *Held*, under the facts of the case and the law, that it was the duty of the city to cover said ditch if it was considered dangerous, or otherwise to protect the people from such danger.

7. *Held*, that a ditch or canal that was constructed prior to the time that a town or city was located along it occupies substantially the same position with reference to the city and its inhabitants as would a natural stream.

8. A right conferred or protected by the law cannot be overthrown or impaired by any authority of the city council derived from the police power.

9. *Held*, that the ditch in question is maintained and operated by the company in the usual manner, and that no unusual conditions exist, and nothing is shown to be harmful or dangerous aside from the fact that people live near it and may fall into it.

10. *Held*, that the duty to cover said ditch devolves upon the city, and that the city cannot impose such duty on the canal owner by declaring said ditch a nuisance.

11. Where a trial court judicially declares a thing to be a nuisance, its judgment is subject to review on appeal the same as any other judgment it may render.

12. *Held*, that because of the change made in that part of said ditch that runs through the Murtaugh Addition and the consent thereto by the city, the doctrine of estoppel is applicable to said city, and that the covering of said ditch through said addition is a matter between the city and the person who made the change.

13. The general power of a city to declare, prevent or abate a nuisance does not include the power to declare anything a nuisance which is not one in fact nor one *per se*.

APPEAL from the District Court of the Fourth Judicial District for the County of Twin Falls. Hon. Edward A. Walters, Judge.

The defendant, as manager of the Twin Falls Canal Company, was tried and found guilty of maintaining a nuisance by maintaining a ditch in one of the streets of the city of Twin Falls. *Reversed*.

A. M. Bowen, for Appellant.

The lateral in question, as a part of the Twin Falls canal system, was constructed under the supervision of the state officials and by authority of the state statutes. (*Hanes v.*

Argument for Appellant.

Idaho Irr. Co., 21 Ida. 512, 122 Pac. 859; *State v. Twin Falls Canal Co.*, 21 Ida. 410, 121 Pac. 1039.)

This court has already decided the law of this case in *Boise City v. Boise City Canal Co.*, 19 Ida. 717, 115 Pac. 505.

Where a canal is constructed and operated according to law, a municipality cannot by extending its street create that a nuisance which was not a nuisance before. As the court says, it can "only become a nuisance by reason of the manner in which it is maintained or the method of its operation." (*Platte & Denver Ditch Co. v. Anderson*, 8 Colo. 131, 6 Pac. 515; *Denver v. Mullen*, 7 Colo. 345, 3 Pac. 693; *Tynon v. Despain*, 22 Colo. 240, 43 Pac. 1039; *City of Denver v. Denver etc. Ry. Co.*, 17 Colo. 583, 31 Pac. 338; *Broder v. Natoma W. & M. Co.*, 101 U. S. 274, 25 L. ed. 790; 6 Cyc. 272, note No. 27.)

Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance. (Sec. 3659, Rev. Codes.) It is held that this section applies to a canal laid out before a public road is laid across it. (*MacCammelly v. Pioneer Irr. Dist.*, 17 Ida. 415, 105 Pac. 1076.)

"Where the legislature directs or authorizes a particular thing to be done, the doing thereof cannot be charged or complained of as a nuisance." (29 Cyc. 1197; *Müller v. Webster City*, 94 Iowa, 162, 62 N. W. 648; *Dolan v. Chicago etc. Ry. Co.*, 118 Wis. 362, 95 N. W. 385; *Murtha v. Lovewell*, 166 Mass. 391, 55 Am. St. 410, 44 N. E. 347; *Simmons v. Patterson*, 60 N. J. Eq. 385, 83 Am. St. 642, 45 Atl. 995, 48 L. R. A. 717; *People v. Detroit Plank Road Co.*, 37 Mich. 195, 26 Am. Rep. 512; *Northern Trans. Co. v. Chicago*, 99 U. S. 635, 25 L. ed. 337.)

The city is estopped after having permitted and acquiesced in the change in the course of the ditch in the city limits. (*Simplot v. Chicago etc. Ry. Co.*, 16 Fed. 350, 5 McCrary, 158; *Los Angeles v. Cohn*, 101 Cal. 373, 35 Pac. 1002; *Sacramento County v. Southern Pac. Ry. Co.*, 127 Cal. 217, 222, 59 Pac. 568, 825; *Chicago v. Union Stockyards & T. Co.*, 164 Ill. 224, 45 N. E. 430, 35 L. R. A. 281; *Spokane St. Ry. Co. v. Spokane*, 6 Wash. 521, 33 Pac. 1072.)

Argument for Respondent.

A right conferred or protected by the constitution cannot be overthrown or impaired by any authority derived from the police power (Dillon on Mun. Corp., 5th ed., sec. 302.) Nor can a city as a rule impair vested property rights. (*Platte & D. Canal Milling Co. v. Lee*, 2 Colo. App. 184, 29 Pac 1036.)

Where any judicial tribunal judicially declares a thing to be a nuisance, its judgment is subject to review as any other judgment. (*Denver v. Rogers*, 46 Colo. 479, 104 Pac. 1042. 25 L. R. A., N. S., 247.)

C. O. Longley, George Herriott and E. L. Ashton, for Respondent.

"Inasmuch as the question of nuisance or no nuisance is one of fact, it becomes necessary in all populous towns to regulate such matters by public ordinance, and the public policy requires that the corporation should not be disturbed in the exercise of its powers unless it clearly transcends its authority." (*Monroe v. Gerspach*, 33 La. Ann. 1011; *Llano v. Llano County*, 5 Tex. Civ. App. 132, 23 S. W. 1008.)

The fact that a person or corporation has authority from the legislature or a municipality to do certain acts does not give the right to do such acts in a way constituting an unnecessary nuisance. (*Sullivan v. Royer*, 72 Cal. 248, 1 Am. St. 51, 13 Pac. 655; *Tuebner v. California etc. Co.*, 66 Cal. 171, 4 Pac. 1162, and cases cited; *Booth v. Rome etc. R. R. Co.*, 140 N. Y. 267, 37 Am. St. 552, 35 N. E. 592, 24 L. R. A. 105; 29 Cyc. 1199.)

"The powers granted to such corporations are to be construed as privileges conferred upon the understanding that they are to be exercised in strict conformity to private rights. and under the same responsibility as though the acts done in the execution of such powers were done by an individual." (*Cleveland etc. R. R. Co. v. Pattison*, 67 Ill. App. 351; *Anderson v. Chicago etc. R. Co.*, 85 Minn. 337, 88 N. W. 1001; *Cogswell v. New York etc. R. Co.*, 103 N. Y. 10, 57 Am. Rep. 701, 8 N. E. 537; *Harmon v. Louisville etc. R. Co.*, 87 Tenn.

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614, 11 S. W. 703; *Baltimore etc. R. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 2 Sup. Ct. 719, 27 L. ed. 739.)

This court in the case of *City of Nampa v Nampa etc. Irr. Dist.*, 23 Ida. 422, 131 Pac. 8, clearly laid down the law as to the right and authority of municipalities to regulate the method and manner of the operation by irrigation companies of ditches and laterals within the municipality.

Though the construction of a thing may be specially authorized by the state or the legislative acts of the state, the manner of the operation is not. (*Platte & Denver Canal & Milling Co. v. Dowell*, 17 Colo. 376, 30 Pac. 68; Kinney on Irrigation and Water Rights, sec. 1448; *Village of Pine City v. Munch*, 42 Minn. 342, 44 N. W. 197, 6 L. R. A. 763; Wood on Nuisance, 853-861.)

SULLIVAN, C. J.—This action was brought to determine the validity of an ordinance of Twin Falls city relating to the covering of a water ditch running through the streets of said city. The appellant was convicted of violating said ordinance in the district court of Twin Falls county and fined one dollar by the trial court, and the appeal is from the judgment and taken for the purpose of determining the legal right of the Twin Falls Canal Company to operate this ditch in the usual and ordinary manner through said city without covering the same as provided by said city ordinance. The appellant is the manager of the Twin Falls Canal Company, which company was in control of the Twin Falls canal system in said county.

The ditch involved is known as the Eighth street ditch, and is a part of the Twin Falls system. This ditch runs partly through sec. 16, which was originally a school section, and at least a part of the original townsite of Twin Falls, and a part through Murtaugh Addition to said city.

There is no substantial conflict in the proof of the case. It is contended on behalf of the city that said defendant as manager of the canal company operated said ditch in a way dangerous and unsafe to the inhabitants of said city, and particularly to those who resided upon the streets through

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which the ditch runs. It is conceded that said ditch was not covered during the times complained of, except at street crossings. The main question involved is as to whether the city of Twin Falls had authority, under the laws of this state, to enact the ordinance referred to and make it applicable to this case, which ordinance provides for the covering of canals, irrigating ditches or water-ways of a certain size within the city of Twin Falls, and also provides a penalty for the violation thereof.

The following facts appear from the record:

That part of the ditch in question which runs through sec. 16 was constructed in September or October, 1904, and was a part of the system provided for by a contract made January 2, 1903, between the state land board and the Twin Falls Land & Water Company. By that contract a right of way was granted across all state and Carey Act lands for the canal system of which said lateral is a part. In return for these concessions, the state acquired certain valuable rights for purchasers of school lands, the purchase price for water rights being ten dollars an acre less than the Carey Act lands.

The part of said ditch through Murtaugh Addition was constructed originally in 1904 through Murtaugh's orchard, but that part which ran through said orchard was reconstructed by Murtaugh along the street in 1909.

Said sec. 16, which was school land, was purchased by the officers and directors of the Twin Falls Land & Water Company and they located the original townsite of Twin Falls on said section. That part of sec. 16 across which said ditch runs was not platted nor the street through which it now runs dedicated to the public until December, 1904, about two months after the construction of said ditch and one year after the Land & Water Company had acquired its right of way by contract with the state. At the time said right of way was obtained and also for some time after the ditch was actually constructed, the land over which the right of way extended was unreclaimed, sagebrush land. Following the construction of the ditch in question, the land became settled and this particular part along said ditch was platted into town lots and

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the street along this ditch dedicated to the public, and a village government was established in 1905 and a city government sometime later.

This canal system, under said state contract, was completed by the construction company and transferred to the Twin Falls Canal Company in September, 1909, and has been operated by the latter company ever since. When this particular ditch was originally constructed, it ran through Murtaugh's orchard in the Murtaugh Addition. In 1909 Murtaugh applied to the city council for permission to change the location of said ditch along one of the city streets, and he obtained the consent of the city to do so and then constructed the ditch along the street and abandoned the ditch through his orchard. No objection was made by the city officials, and this change in the ditch was made before the transfer of the system to the settlers.

It is admitted that the operation of the ditch has always been in the usual and ordinary manner; that there is nothing in the ditch itself nor in the operation of the same by which it should be classified differently from other ditches in the state, of the same size and capacity. It is the ordinary ditch or lateral of the said canal company's system, properly maintained like others in said system. It has an average width through the city of about ten feet, and during high water the water depth is a little over three feet, while the velocity is only such as is usual and customary in ditches of that character.

Under the facts of the case the question involved is whether it is the duty of the canal company or the city to cover said ditch or otherwise protect people from falling therein.

The city apparently contends that said ditch is a nuisance in fact. It is clear that if this contention be correct and it is a nuisance in fact, it is not because of anything extraordinary in its construction, maintenance or operation. The ditch in question is not only permitted by the law of the state, but was constructed under and by virtue of a contract with the state land board under the provisions of the statute. (Sec. 1621, Rev. Codes.) The location, dimensions and character of

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the ditch were provided for by the contract. The state through its land board and its state engineer not only expressly provided for the construction of said canal system, including the ditch in question, but exercised a supervisory control thereover. The statute makes it the legal duty of the state engineer to pass upon the sufficiency of such a canal system (sec. 1623, Rev. Codes) and the state, for a failure on the part of the construction company to comply with such contract may forfeit and sell the works and assets of the contractor to the highest bidder. This court held in the case of *State v. Twin Falls Canal Co.*, 21 Ida. 410, 121 Pac. 1039, as follows: "Under the provisions of the statute, the completing of said works is supervised by the state and ultimately the works must be turned over to the settlers, thereby providing a kind of municipal ownership."

In *Hanes v. Idaho Irr. Co.*, 21 Ida. 512, 122 Pac. 859, this court held: "The state law provides means whereby irrigation works may be constructed for the reclamation of such lands by any individual, association or company under the supervision of the state."

The relationship of the state to the Twin Falls project must be borne in mind. This system having been constructed under the laws and supervision of the state, the question naturally presents itself whether the city as a municipality of the state may declare a ditch constructed under the laws and supervision of the state a nuisance.

It is provided by sec. 3659, Rev. Codes, that nothing which is taken or maintained under the express authority of a statute can be deemed a nuisance. (See *MacCammelly v. Pioneer Irr. Dist.*, 17 Ida. 415, 105 Pac. 1076.) In *Boise City v. Boise City Canal Co.*, 19 Ida. 717, 115 Pac. 505, it was held that where a canal has been constructed and operated in accordance with the law, it is not a nuisance, and can only become a nuisance by reason of the manner in which it has been maintained or the method of its operation, and the mere fact that a municipality subsequently extends a street across a canal which has been legally constructed and operated does not convert the canal into a nuisance at a place where the street

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crosses the same, and held that the city had no authority or power to compel the owner of the canal to build a bridge across such canal where such street had been extended across the canal subsequent to its construction.

It is conceded by counsel for respondent that the maintenance of said ditch is not a nuisance *per se*, but the question of its being a nuisance has been judicially determined in favor of the city and against the defendant in this case, and is conclusive; that the trial court found said ditch as operated by the appellant to be a public menace, dangerous and injurious to the health and safety of the inhabitants of Twin Falls and a nuisance.

If the canal company were guilty of any neglect of duty which resulted in creating the alleged nuisance, a different question would arise. But it must be remembered that no dangerous or obnoxious conditions were shown except as would necessarily result from a failure to have the ditch covered or inclosed.

The complaint charges the appellant with failure to "confine in a closed conduit or to cover all over or any part," etc., "thus permitting same" to become a nuisance. The case is predicated upon the idea that the failure to cover the ditch caused the nuisance. Of course, if the city failed to perform a duty that devolved upon it, the appellant could not be punished for a condition resulting from the nonperformance by the city of that duty. Under the facts and the law, it was clearly the duty of the city to cover said ditch, and if it were dangerous, to protect the people from such danger. The city has the power, under the law, to establish, lay out, alter, open any streets and alleys, improve and repair them, also to construct bridges and to wall and cover channels or watercourses.

In *MacCammelly v. Pioneer Irr. Dist.*, 17 Ida. 415, 105 Pac. 1076, this court held that the duty of constructing bridges across a previously constructed ditch rested upon the county. A ditch or canal that was constructed prior to the time that a town or city was located along it occupies substantially the same position with reference to the city and its inhabitants as would a natural stream. If the water of a natural stream is

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used for the irrigation of lands along its course, it would not be just or right to compel such users to cover the stream where it ran through a village or city; it would develop upon the municipality to place such barriers along such stream as would be necessary to protect its people. A canal company is under the obligation to keep its canal in proper repair and proper condition to furnish the water users with water, and if this is properly done, the municipality would have no more right to complain than it would if it were a natural stream. The users of water from a natural stream would have the right to have the water of such stream, if they had appropriated it prior to the time that the village or city was laid out or established upon its borders, kept within its banks in order to give them the full benefit of their prior appropriations. The rule of law applicable to such a case would be the same whether the channel through which the water was conducted was artificial or natural.

As before stated, the appellant here was simply the manager of the Twin Falls company, and maintained said ditch as it had been maintained from the time it was constructed and prior to the extension of the city limits over it.

It was held in *Morris Canal & Banking Co. v. State*, 24 N. J. L. 62, which is a case similar to the one under consideration, that no highway being in existence when the canal was built at the place where the highway was located across it, the highway was not obstructed by the act of defendants, and that the company did no act for which they were indictable and created no nuisance which it was bound to abate.

The canal company involved in this action did no act, so far as the covering of said ditch was concerned and created no nuisance, which its manager was bound to abate.

In *Broder v. Natoma Water & Min. Co.*, 101 U. S. 275, 25 L. ed. 790, where it was sought to declare a ditch a nuisance, the court held that it could not be done by reason of the fact that the right of way for the ditch had been acquired prior to the time that the plaintiff had procured title to his land from the United States.

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In the case of the *City of Denver v. Mullen*, 7 Colo. 345, 3 Pac. 693, the defendants had a right of way or easement for a water ditch used to carry water to a flour-mill and for irrigation. The city of Denver later extended its streets over the ditch and as the neighborhood became populous the ditch without being bridged amounted to an annoyance to the public. The city proceeded by ordinance to declare it a nuisance and to abate it as such. The facts were similar to the facts in the case at bar, the only difference being the method of procedure. In that case the court held that even where a nuisance existed, the municipality could not legislate against it until it had been judicially decreed a nuisance, it not being a nuisance *per se*, and that in view of the fact that the only point wherein it was claimed the operation thereof created a nuisance was the absence of bridges, no nuisance could exist for the reason that the duty to build the bridge rested upon the municipality. The court there held that the power of the city to declare what shall be a nuisance and to prevent and remove the same did not mean that the city council might by mere resolution or motion declare any particular thing a nuisance which had not theretofore been pronounced to be so by law or so adjudged by judicial determination.

If the alleged nuisance resulted from some duty resting upon the canal company, of course the company would be liable; but if the nuisance rests upon the failure of the city to perform its duty, then the company cannot be held for such nuisance. A right conferred or protected by the constitution or the law cannot be overthrown or impaired by any authority derived from the police power. (1 Dillon on Municipal Corp., 5th ed., sec. 301.)

It appears from the record that the ditch in question has been and is maintained and operated by the company in the usual manner. No unusual conditions exist. Nothing is harmful or dangerous aside from the fact that the people live near it and may fall into it. The street intersections are bridged, and foot-bridges are maintained across it in front of several residences.

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Counsel for respondent cites and relies upon the case of *City of Nampa v. Boise & Nampa Irr. Dist.*, 23 Ida. 422, 131 Pac. 8, recently decided by this court. That case is not an authority in the case at bar. It did not involve the right to carry water through the city in an open ditch where the right of way had been acquired first, but where the right to use the streets for the distribution of water was acquired afterward by grant from the city. The court in rendering that decision had no intention of modifying the doctrine announced in either of the Idaho cases heretofore cited. It is clear that if the duty to cover said ditch rested by law on the city, the city cannot impose such duty on the canal owner by claiming a nuisance exists because of the failure of the canal owner to cover said ditch. The city certainly cannot evade its duty by declaring said ditch a nuisance when the nuisance is created by its own neglect to perform its duty.

Where a trial court judicially declares a thing to be a nuisance, its judgment is subject to review the same as any other judgment it may render, and the question whether a certain condition or state of facts creates a nuisance in law is a legal question which may be passed upon by the appellate court.

As to that part of the ditch which runs through the Murtaugh Addition, see the facts heretofore stated in regard to why the change in said ditch was made. Murtaugh and the city being responsible for said change from the point where said ditch was originally constructed in 1904, the city acquired no greater right over said ditch than it had prior to the change. The doctrine of estoppel *in pais* is applicable to municipal corporations and they will be estopped in certain cases. (See Dillon on Municipal Corps., 5th ed. sec. 1191.) What has been said heretofore in regard to said ditch applies equally to it as changed by Murtaugh with the consent of the city. The fact that the city in giving its consent in this matter acted irregularly, if it did so act, does not avoid the estoppel. If the city did not have the authority to grant the permission to make the change, then it could not be estopped;

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but if it did have the authority and exercised it irregularly, then the city would be estopped. (See *City of Portland v. Bituminous Paving & Imp. Co.*, 33 Or. 307, 72 Am. St. 713, 52 Pac. 28, 44 L. R. A. 527.)

It would appear that the change was made to accommodate Murtaugh, and the company's afterward taking charge of the management of the ditch as changed would not make the company liable; and if the company could not take over the changed ditch upon the same terms as the old, it would probably not have taken it over, if it was going to cost them several thousand dollars because of the change. It would appear that the covering of the ditch through the Murtaugh Addition is a matter between the city and the persons who made the change. The city by ordinance could not make a nuisance where a nuisance did not exist and where the law says none shall exist. If it were held that the canal company, which is composed of the settlers and farmers on the land irrigated from said canal, is called upon to pay for covering said ditch through the city, they would be called upon to pay for the benefit of the residents of the city and be required to pay for covering a ditch that was constructed prior to the location of the city along the ditch.

We therefore conclude that the duty of covering or bridging a canal or water ditch over or along a public street or highway depends on the time when the right of way attached or the ditch was constructed. If the right of way was obtained or was created first and the highway or street laid out afterward, such duty does not rest upon the ditch owner but upon the public, that is, the city, town or highway district, as the case may be. Where a city acquires an easement for a street on or over land upon which a prior easement exists, the city takes such subject to the previous right of way or easement.

The general power of a city to declare, prevent and abate a nuisance does not include the power to declare anything a nuisance which is not one in fact nor one *per se*.

For the foregoing reasons the judgment of the trial court must be reversed, and it is so ordered, and the cause remanded

Points Decided.

with instructions to render judgment in favor of the appellant in accordance with the views expressed in this opinion. Costs awarded to appellant.

Budge and Morgan, JJ., concur.

(October 5, 1915.)

STATE, Appellant, v. S. F. HORN, JOHN EILER and
JOHN CALVIN, Respondents.

[152 Pac. 275.]

CONSTITUTIONALITY OF SEC. 6872, REV. CODES, AFFIRMED—EXERCISE OF
POLICE POWER OF STATE ON PUBLIC DOMAIN WITHIN STATE—
REGULATION OF SHEEP AND CATTLE INDUSTRIES—LEGISLATIVE PRE-
ROGATIVE TO EXERCISE POLICE POWER OF STATE.

1. The owners of sheep, equally with all other citizens of the state, are entitled to the use of the public domain within the jurisdiction of the state, subject to the right of the state in the exercise of its police power to control and regulate such use.

2. The control and regulation of the various industries of the state under a proper exercise of the police power rests with the legislative department of the state government, and it is only against a palpable abuse of the power that the courts may interpose. If, in the judgment of the legislature, and in order to protect the public health, public morals or public safety, or to enhance the general prosperity of the citizens, any particular industry requires protection or regulation upon the public domain within the state, such protection or regulation may be afforded by a proper legislative enactment.

3. It is within the constitutional prerogative of the legislature, in the exercise of the police power of the state, to minimize the opportunities for conflict between the sheep and cattle industries, to the extent of prohibiting sheep from running "on any cattle range previously occupied by cattle, or upon any range usually occupied by any cattle grower, either as a spring, summer or winter range for his cattle," as provided in sec. 6872, Rev. Codes.

4. The lands constituting the public domain of the United States within the jurisdiction of this state are subject to the police

Argument for Appellant.

regulations of the state, as expressed in legislative enactments, the same as the lands of any citizen of the state, so far as such laws and regulations are not in conflict with the federal constitution or statutes; and until Congress provides by law that sheep shall not be restricted by state laws from grazing anywhere upon the public domain, the state, by proper legislation, may regulate and control that matter.

5. Individuals engaged in the sheep industry are not entitled to claim that the same legislative restrictions and privileges be applied to that industry as to rival industries, such as the horse or cattle industry. The habits and nature of these animals being different, as well as the results which follow from their use of land for grazing purposes, it is competent for the legislature to take these differences into consideration and to provide for them by regulations designed to meet existing conditions in each particular industry. When the law under consideration treats all individuals of the class of sheep-men alike under similar circumstances and conditions, both as regards the privileges conferred and the liabilities imposed, it is not class or special legislation, and is not obnoxious to the provisions of sec. 1, art. 1 of the state constitution which enumerates, among the inalienable rights of the citizen, the "acquiring, possession and protecting property."

6. The equality clause of the federal constitution, as embodied in the 14th amendment, is not necessarily infringed by legislative classification of persons or things. This clause only requires that the same means and methods be applied impartially to all the constituents of a class, so that the law may operate equally and uniformly upon all persons in similar circumstances.

APPEAL from the District Court of the Sixth Judicial District for Custer County. Honorable J. M. Stevens, Judge.

Criminal prosecution for herding and grazing sheep on cattle range in violation of sec. 6872, Rev. Codes. Judgment for defendant. *Reversed.*

J. H. Peterson, Atty. Genl., T. C. Coffin, J. J. Guheen and E. G. Davis, Assts., A. J. Higgins and W. W. Adamson, for Appellant.

"It is a part of the public history of this state that the industry of raising cattle has been largely destroyed by the encroachments of innumerable bands of sheep. Cattle will

Argument for Respondents.

not graze, and will not thrive, upon lands where sheep are grazed to any great extent." (*Sweet v. Ballentyne*, 8 Ida. 431, 437, 69 Pac. 995.)

In the exercise of its police power a state may absolutely or unconditionally restrain any and all livestock from running at large, and this without any reasons or grounds other than that of expediency, as determined by the legislative will. (*Kimmish v. Ball*, 129 U. S. 217, 9 Sup. Ct. 277, 32 L. ed. 695; 1 Tiedeman on State and Federal Control of Persons and Property, p. 838.)

The keeping of livestock is under the police regulations of the state, and such police regulations extend over the public lands of the United States within the state. (*Spencer v. Morgan*, 10 Ida. 542, 79 Pac. 459; *Swanson v. Groat*, 12 Ida. 148, 85 Pac. 384; *Risse v. Collins*, 12 Ida. 689, 87 Pac. 1006.)

As to sec. 6872 being class or special legislation, if all persons subject to it are treated alike under similar circumstances and conditions in respect to both privileges conferred and liabilities imposed, it is not special. (*Missouri Pac. R. Co. v. Mackey*, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. ed. 107.)

J. M. Stevens and C. R. Clute, for Respondents.

The common law of England that every man must restrain his own stock is not applicable to the sparsely settled portions of the west. (*Buford v. Houtz*, 133 U. S. 320, 10 Sup. Ct. 305, 33 L. ed. 618.)

"If a statute purporting to have been enacted to protect the public health, public morals, or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution." (*Ex parte Whitwell*, 98 Cal. 73, 35 Am. St. 152, 32 Pac. 870, 19 L. R. A. 727; *Smiley v. McDonald*, 42 Neb. 5, 47 Am. St. 684, 60 N. W. 355, 27 L. R. A. 540; *In re Hong Wa*, 82 Fed. 623; *Fraser v. People*, 141 Ill. 171, 31 N. E. 395, 16 L. R. A. 492; *Sutton v. State*, 96 Tenn. 696, 36 S. W. 697, 33 L. R. A. 589; *State v. Walsh*, 136 Mo. 400,

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37 S. W. 1112, 35 L. R. A. 231; *State v. Speyer*, 67 Vt. 502, 48 Am. St. 832, 32 Atl. 476, 29 L. R. A. 573; *New Orleans Gas-light Co. v. Louisiana Light etc. Mfg. Co.*, 115 U. S. 650, 6 Sup. Ct. 252, 29 L. ed. 516; *Lawton v. Steele*, 152 U. S. 133, 14 Sup. Ct. 499, 38 L. ed. 385.)

The mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the fourteenth amendment, and in all cases it must appear, not only that the classification has been made, but also that it is one based upon some reasonable ground, some difference which bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection. (*Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 22 Sup. Ct. 431, 46 L. ed. 679; *Cooley on Const. Lim.*, pp. 556-575; *Wagner v. Milwaukee County*, 112 Wis. 601, 88 N. W. 577; *Nichols v. Walter*, 37 Minn. 264, 33 N. W. 800; *Murray v. Board of Commrs.*, 81 Minn. 359, 83 Am. St. 379, 84 N. W. 103, 51 L. R. A. 828; *People v. Gillson*, 109 N. Y. 389, 4 Am St. 465, 17 N. E. 343; *Gulf C. & S. F. Ry. Co. v. Ellis*, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. ed. 666.)

BUDGE, J.—The defendants in this case were informed against in the justice court of Challis precinct, Custer county, and charged with herding and grazing about 2,000 sheep on a cattle range previously occupied as a spring and fall range belonging to divers persons; such persons, by the usual and customary use of such range as a cattle range, having possessory right thereto as against sheep.

This action was prosecuted under sec. 6872, Rev. Codes, which provides that "Any person owning or having charge of sheep, who herds, grazes, or pastures the same, or permits or suffers the same to be herded, grazed or pastured, on any cattle range previously occupied by cattle, or upon any range usually occupied by any cattle-grower, either as a spring, summer or winter range for his cattle, is guilty of a misdemeanor; but the priority of possessory right between cattle and sheep owners to any range, is determined by the priority in the usual and customary use of such range, either as a cattle or sheep range."

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The defendants were tried before a jury in the justice court and found guilty, and sentenced to pay a fine. From such conviction and judgment they appealed to the district court of the sixth judicial district. In due time said cause came on regularly for trial before the court and jury.

At the conclusion of the evidence offered on behalf of the state, the following motion was interposed by the attorneys for the defendants:

"We move that a peremptory instruction be given to the jury to discharge the defendants or to return a verdict of not guilty and that the defendants be discharged, for the reasons given in our first objection to any testimony being given in this case whatever, namely:

"That the complaint does not state facts sufficient to constitute a criminal offense against the laws of the state of Idaho.

"That the section of the statute upon which this prosecution is attempted is unconstitutional as an improper attempt by the legislature to control or give preference rights in and to portions of the public domain of the United States within the jurisdiction of this state.

"That it is class legislation and that the legislature has no power or control over the public domain, as the jurisdiction and control of the same rests entirely within the Congress of the United States, and this action is not prosecuted under any law of the United States."

The trial court granted said motion, and dismissed the jury, rendering a final judgment against the state; to which ruling and judgment of the court the state duly excepted. This is an appeal from the order and judgment so made and entered by the district court.

In passing we might suggest that the trial court undoubtedly inadvertently overlooked sec. 7877, Rev. Codes, when the motion was entertained to instruct the jury to discharge the defendants or to return a verdict of not guilty, and in excusing the jury from the further consideration of the cause and discharging the defendants. Said sec. 7877, Rev. Codes, provides: "If, at any time after the evidence on either side

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is closed, the court deems it insufficient to warrant a conviction, it must advise the jury to acquit the defendant. But the jury are not bound by the advice." However, at the suggestion of counsel for the state, we will ignore this error and proceed to a determination of this case as though no such error had occurred.

The range in question is a strip of public domain about three and one-half miles wide by five miles long, located in Pahsimaroi valley, and is bordered on one side by a chain of farms owned by cattle-men and farmers, and on the other side by the Lemhi Forest Reserve. It appears from the evidence in this case that the farmers and ranchers range their cattle within the boundary lines of said range during the spring and fall, prior to ranging them upon the Lemhi Forest Reserve, and again in the fall, when the cattle are driven from the forest reserve by reason of storms and prior to the time when the cattle are fed in the early winter or late fall.

It was conceded upon the oral argument of this case that if sec. 6872, Rev. Codes, *supra*, is constitutional, the complaint is sufficient.

Counsel for respondent insist that this section is unconstitutional for the following reasons: First, that it is in direct contravention of sec. 1, art. 1 of the constitution of Idaho; second, that it is an encroachment upon the powers of the general government in that it attempts to give the state control over the public domain and the natural products thereof; third, it is not a proper police regulation, in that it has no real or substantial relation to the public health, public morals or public safety; it arbitrarily interferes with a private business, and imposes unusual and unnecessary restrictions upon a lawful business; fourth, it is in direct violation of the fourteenth amendment of the constitution of the United States, in that it is class legislation of the most vicious character, denying to the respondent equality of rights.

We are unable to reach the conclusion that the section of the statutes under consideration is in contravention of sec. 1, art. 1, of the constitution, which provides that "All men are by nature free and equal, and have certain inalien-

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able rights, among which are enjoying and defending life and liberty; acquiring, possessing and protecting property; pursuing happiness and securing safety." The effect of said sec. 6872, Rev. Codes, respondents contend, is to deprive them of the right to acquire, possess or protect their property. But we fail to see how such a construction could be placed upon this section. They surely would not be deprived of this right by reason of being prohibited from herding, grazing or pasturing, or permitting or suffering their sheep to be herded, grazed or pastured upon the public domain previously occupied by cattle, or upon any range usually occupied by any cattle-grower, either as a spring, summer or winter range for his cattle.

The public domain is not the property of the respondents, but of the United States. The respondents have an equal right with all other citizens of the state to the use of this public domain within the jurisdiction of the state, subject to the right of the state to control and regulate such use. The state has an interest in the enjoyment of the right to the use of the public domain that is paramount to that of its citizens and may, in the exercise of its police power, for the general well-being and to promote the public health, the public morals or the public safety, regulate and control the use of the public domain within the confines of the state; which control and regulation rests with the legislative department, and it is only against the abuse of this power that the courts may interpose.

If, in the wisdom of the legislature, and in order to protect the public health, the public morals or the public safety, or to enhance the general prosperity of the citizens, any particular industry requires protection or regulation upon the public domain within the state, such protection or regulation may be afforded by proper legislative enactment. (*Bacon v. Walker*, 204 U. S. 311, 27 Sup. Ct. 289, 51 L. ed. 499.)

As we deem the third question raised by counsel for respondents—the constitutionality of sec. 6872, Rev. Codes,

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as a police regulation—to be closely related to the question just disposed of, we will consider it next in order.

The right of the state, under its police power, to regulate the running at large of livestock has been so frequently determined by this court, that it would be a useless repetition to reiterate the principles of law expressed in the various decisions upon that subject. They will be found in the cases of *Sifers v. Johnson*, 7 Ida. 798, 97 Am. St. 271, 65 Pac. 709, 54 L. R. A. 785; *Sweet v. Ballentyne*, 8 Ida. 431, 69 Pac. 995; *Spencer v. Morgan*, 10 Ida. 542, 79 Pac. 459, and cases therein cited. And if it is within the police power of the state to regulate the running at large of livestock, and to prohibit certain animals from running at large, such, for instance, as hogs, or other animals which, from their nature or condition, might be deemed to be injurious or detrimental to the stock industry, it would of necessity lie within that power to restrict the herding or grazing of sheep upon the public domain within certain months of the year, or to absolutely prohibit the herding or grazing of sheep upon any part or portion of the public domain within the limits of the state.

In the case of *Sifers v. Johnson*, *supra*, this court said: "The police power of the state is very great. Under it many things may be done which at first glance seem to infringe upon natural and civil rights. The protection of health, prevention and suppression of nuisances, controlling the conduct of business which affects others not engaged in the same, the preservation of the public peace and protection of the public welfare are legitimate subjects calling for the exercise of the police power of the state."

Judge Cooley, in his work upon *Constitutional Limitations*, sixth edition, at page 743, says: "The most proper business may be regulated to prevent its becoming offensive to the public sense of decency, or for any other reason injurious or dangerous."

In his work upon *State and Federal Control of Persons and Property*, Mr. Tiedeman, at page 838, says: "In every state the keeping of livestock is under police regulation. . . . The clash of interest between stock-raising and farming calls

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for the interference of the state by the institution of police regulations; and whether the regulations shall subordinate the stock-raising interest to that of farming, or *vice versa*, in the case of an irreconcilable difference, as is the case with respect to the going at large of cattle, is a matter for the legislative discretion, and is not a judicial question. In the exercise of this general power of control over the keeping of livestock, the state . . . may prohibit altogether the running at large of such animals, and compel the owners to keep them within their own inclosures."

In the case of *Chicago, B. & Q. R. R. Co. v. Illinois*, 200 U. S. 561, 26 Sup. Ct. 341, 50 L. ed. 596, 4 Ann. Cas. 1117, we find the following statement: "We hold that the police power of a state embraces regulations designed to promote the public convenience or the general prosperity as well as regulations designed to promote the public health, the public morals, or the public safety. . . . And the validity of a police regulation, whether established directly by the state or by some public body acting under its sanction, must depend upon the circumstances of each case and the character of the regulation, whether arbitrary or reasonable, and whether really designed to accomplish a legitimate public purpose."

The clash between the sheep industry and the cattle industry, and between the sheep and farming industry, is a part of the history of this state; and the enforcement of certain police regulations has resulted in minimizing a conflict that was detrimental in the extreme to all three of these legitimate and necessary industries. The differences between these industries, while minimized, still exist in many portions of the state. This unfortunate condition is not one that has existed only during the settlement of this country, but was regulated and controlled under the common law of England, where the clash was between the sheep men and the tiller of the soil.

During the reign of Henry the VIII, in the sixteenth century (Froude's History of England), there was a sharp conflict between the sheep industry and the farmer that resulted

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in more drastic legislation than has been enacted by the legislature of this state upon that question. By reason of the absence of, or failure to enforce, proper police regulations looking to the control of the public domain at the time referred to, it became almost impossible for the farming communities to maintain themselves, due to the rapid growth of the sheep and cattle industries. Farms were forsaken, and the entire country depopulated as a result of the unlimited number of sheep which were owned by a few, comparatively speaking, of the people residing in the British Isles. It became necessary for the sheep owners, in order to properly provide range for their vast herds, to acquire all of the lands that could be obtained and to monopolize the public domain for the purpose of securing feed for their flocks. Conditions became so bad that an act was passed by parliament, wherein it was provided:

“Whereas, divers and sundry persons of the king’s subjects of this Realm, to whom God of his goodness hath disposed great plenty and abundance of movable substance, now of late, within few years, have daily studied, practiced, and invented ways and means how they might accumulate and gather together into few hands, as well great multitude of farms as great plenty of cattle, and in especial, sheep, putting such lands as they can get to pasture and not to tillage; whereby they . . . keep in their hands such great portions and parts of the lands of this Realm from the occupying of the poor husbandmen, and so to use it in pasture and not in tillage, is the great profit that cometh of sheep . . . it is hereby enacted, that no person shall have or keep on lands not their own inheritance more than 2,000 sheep. . . . ”

This act was considered as a necessary police regulation and enacted for the purpose of protecting the farmers against an industry that in and of itself was legitimate and had become an integral part of the development of the country and entitled to legitimate encouragement. But as in that day, so in this, it has become necessary to subordinate one of two industries to avoid a condition that the legislature in its

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wisdom has said might be seriously detrimental to the welfare of the people.

It has been held by this court repeatedly that it is within the discretion of the legislature to subordinate the sheep industry to that of farming or *vice versa*. The legislature of this state, in what is commonly known as the "Two Mile Limit Law," has declared that the sheep industry shall be subordinate to that of farming. If this should work a hardship to that industry, it is in the legislature and not the courts that relief must be sought. This court has said that the legislature in subordinating the sheep industry to that of farming did so for the express purpose of protecting the peace, quiet and comfort of the small farmers of the state. (*Sweet v. Ballentyne*, 8 Ida. 431, 69 Pac. 995.)

And by analogy, it would seem that if it is within the power of the legislature as a police regulation to subordinate the sheep industry to that of farming, it must also be within the power of that body to subordinate the sheep industry to the cattle industry to the extent of prohibiting sheep from running "on any cattle range previously occupied by cattle, or upon any range usually occupied by any cattle grower, either as a spring, summer or winter range for his cattle."

We will now consider the second proposition of respondents, viz., that the legislature of the state by this act is encroaching upon the powers of the general government by exercising control over the public domain and the natural products thereof.

In the case of *Sweet v. Ballentyne*, 8 Ida. 431, 69 Pac. 995, (on rehearing, 8 Ida. 451, 69 Pac. 1000), this court held that "So far as the public domain of the United States, in this state, is concerned, it is under the police regulations of the state, and governed thereby, the same as the lands of the citizen, wherein such laws or regulations are not in conflict with the federal constitution, or the laws of Congress, and, until Congress provides by law that sheep shall not be restricted by state laws from grazing everywhere upon the public domain, the state, by proper legislation, may regulate and control that matter."

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In support of their contention, counsel for respondents direct our attention to an act of Congress of February 25, 1885 (23 Stat. at L. 321, U. S. Comp. Stats. 1913, sec. 4997, 6 Fed. St. Ann., p. 533), prohibiting the unlawful occupancy of public lands. That act, however, is not in conflict with the opinions of this court in the cases of *Sifers v. Johnson*, *Sweet v. Ballentyne* and *Spencer v. Morgan*, *supra*, and has no application to the case at bar.

That act was passed for the purpose of prohibiting the unlawful fencing of the public domain of the United States, and was directed against persons and corporations who, at the time of its passage, had fenced and were engaged in the fencing of large areas of the public domain by inclosing the same with barb-wire, and thereby preventing the use of the public domain by the citizens of the United States as a whole; and retarding the settlement of the public domain by individual citizens who sought to permanently establish their homes thereon. The object that Congress had in view was to prohibit the monopoly by a few individuals of the public domain of the United States which, as before stated, is not in conflict with the statutes of this state or the decisions of this court, but is strictly in accord with the policy pursued by our legislature in regulating the right to the use of the public domain by the sheep, cattle and farming industries.

In their fourth contention counsel for respondents maintain that sec. 6872, Rev. Codes, is in direct violation of the fourteenth amendment to the United States constitution, in that it is class legislation, denying to the respondents equality of rights. We are unable to see any merit in this contention.

It is well settled that a law is not special in character "if all persons subject to it are treated alike, under similar circumstances and conditions, in respect both of the privileges conferred and liabilities imposed." (*Missouri Pac. R. Co. v. Mackey*, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. ed. 107.) In the case of *Sweet v. Ballentyne*, *supra*, at page 448, it was said: "It cannot be seriously contended that said law [two mile limit law] is class legislation because it does not include

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cattle and horses, as well as sheep, as the habits and nature of the animals, their effects on the land on which they graze, are not the same. However, the law under consideration treats all sheep-men alike, under similar circumstances and conditions, in respect both of the privileges conferred and the liabilities imposed, and is, for that reason, not class legislation—no more than the law not requiring one to fence against hogs is class legislation against the hog-grower; nor does that deny him equal protection under the law. The statute in question affords the same protection to the sheep-raiser as it does to other citizens. . . . That statute is general in its terms, and affords protection for all and to all alike.”

The equality clause of the federal constitution is not necessarily infringed by special legislation or by legislative classification of persons or things. This clause only requires that the same means and methods be applied impartially to all the constituents of a class so that the law may operate equally and uniformly upon all persons in similar circumstances. It merely requires that all persons subject to such legislation shall be treated alike under like circumstances and conditions. (*Central Lumber Co. v. South Dakota*, 226 U. S. 157, 33 Sup. Ct. 66, 57 L. ed. 164; *State v. Leavitt*, 105 Me. 76, 72 Atl. 875, 26 L. R. A., N. S., 799.) It is a rule that a statute relating to persons or things as a class is a general law, but that one relating to particular persons or things of a class is special. (*State v. Walsh*, 136 Mo. 400, 37 S. W. 1112, 35 L. R. A. 231.)

We are of the opinion that the statute under consideration is not an arbitrary discrimination between sheep and other classes of stock, or that it is class or special legislation, because it embraces all classes subject to such legislation under like circumstances and conditions.

Sec. 6872, Rev. Codes, is a police regulation and was enacted by the legislature to promote the peace, safety and general welfare of the citizens of the state, and that being true, we doubt the applicability of the fourteenth amendment of the United States constitution to the case under consideration.

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It was said in the case of *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. ed. 923, a case similar in principle to the one here under consideration: "But neither the amendment [14th amendment to United States constitution], broad and comprehensive as it is, nor any other amendment was designed to interfere with the power of the state, sometimes termed its 'police power,' to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the state, develop its resources and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts. . . . Special burdens are often necessary for general benefits. . . . Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon anyone, but to promote, with as little individual inconvenience as possible, the general good. Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment.

" The inconvenience arising in the administration of laws from this cause are matters entirely for the consideration of the state; they can be remedied only by the state."

In the case of *Minneapolis & St. Louis R. Co. v. Beckwith*, 129 U. S. 26, 29, 9 Sup. Ct. 207, 32 L. ed. 585, the court used this language: "But the clause [sec. 1, 14th amendment to United States constitution] does not limit, nor was it designed to limit the subjects upon which the police power of the state may be exerted. . . . The nature and extent of such legislation will necessarily depend upon the judgment of the legislature as to the security needed by society."

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It may be stated, as a general proposition, that a statute must clearly appear to be unreasonable and arbitrary before the courts are justified in interfering; and that the necessity and desirability of laws of this character are very largely matters to be determined by the legislature. (*Minneapolis & St. Louis R. R. Co. v. Beckwith*, and *Bacon v. Walker*, *supra*.)

In holding sec. 6872, Rev. Codes, unconstitutional upon the grounds and for the reasons assigned by the respondent in this case, it would be incumbent upon this court to hold contrary to the principles of law announced in the cases of *Sifers v. Johnson*, *Sweet v. Ballentyne*, *Spencer v. Morgan* and *Bacon v. Walker*, *supra*. Should we do that, it would unsettle the policy of this state which has been fixed for so many years by these decisions, and which is intended to promote the peace, safety and general welfare of the citizens of this commonwealth by the exercise of the police power of the state in the regulation of the right to the use of the public domain by the sheep, cattle and farming industries.

We have therefore reached the conclusion that sec. 6872, Rev. Codes, is not in contravention of sec. 1, art. 1 of the constitution of this state; that it is not an encroachment upon the powers of the general government; that it is a proper police regulation enacted by the legislature for the express purpose of protecting the public peace, public safety and promoting the general welfare of the citizens, and does not arbitrarily interfere with a private business or impose upon such business unusual and unnecessary restrictions; and that it is not in direct violation of the fourteenth amendment to the constitution of the United States.

It follows from the conclusions of the court as heretofore expressed in this opinion that the trial court erred in sustaining the motion of the respondents and in discharging the defendants and entering up judgment against the state. The judgment is reversed.

Sullivan, C. J., and Morgan, J., concur.

Points Decided.

(October 5, 1915.)

STATE, Respondent, v. SECUNDINO OMAECHEV-
VIARIA, Appellant.

[152 Pac. 280.]

**PENAL STATUTES—DEFINITENESS OF TERMS—LANGUAGE OF SEC. 6872,
REV. CODES, SUFFICIENTLY DEFINITE AND CERTAIN.**

1. This is a companion case to that of *State v. Horn et al.*, ante, p. 782, and the conclusions reached by this court in that case are decisive of all but one of the questions raised in the case at bar, viz., the uncertainty of sec. 6872, Rev. Codes, and consequently its unconstitutionality as a criminal statute.

2. Where a statute has been in force for many years, receiving a practical interpretation and accepted in all its terms, the most careful consideration should be given questions involved in its interpretation if it then be attacked as conflicting with the constitution; as, unless its language is so obscure and doubtful as to entitle it to no weight or consideration, the long-accepted, practical interpretation is more likely to be right than a newly discovered one suggested by the exigencies of current litigation.

3. *Held*, that sec 6872, Rev. Codes, which was enacted by the 12th session of the territorial legislature in 1883, re-enacted as sec. 6872; Rev. Stat. of 1887, and continued in force by sec. 2 of the schedule and ordinance contained in article 21 of the state constitution, approved by the federal government at the time Idaho was admitted to the Union, is couched in sufficiently definite language to meet the object sought to be attained.

4. Where there are two constructions that may be fairly given a legislative act designed to effect a great public purpose, one of which will carry out the intent and purpose and the other will defeat the intent and purpose of the act, the former construction should be applied.

5. Laws are enacted to be read and obeyed by the people, and in order to reach a reasonable and sensible construction thereof, words that are in common use among the people should be given the same meaning in the statute as they have among the great mass of the people who are expected to read, obey and uphold them.

6. A cattle range in this state has a well-defined meaning, and so has a sheep range; and this meaning is fully recognized by persons engaged in the two industries.

7. Sec. 6872, Rev. Codes, is a police regulation and must necessarily be construed with and as a part of sec. 6314, Rev. Codes,

Argument for Appellant.

which provides: "In every crime or public offense there must exist a union, or joint operation, of act and intent, or criminal negligence." In other words, there must be an intent to violate sec. 6872, Rev. Codes, *supra*, as well as the act of driving or herding sheep upon a cattle range, in order to warrant a conviction of the defendant.

APPEAL from the District Court of the Third Judicial District for Owyhee County. Hon. Carl A. Davis, Judge.

Criminal prosecution for herding, grazing and pasturing sheep upon a cattle range, in violation of sec. 6872, Rev. Codes. Judgment for plaintiff. *Affirmed.*

Oppenheim & Hodgin, for Appellant.

The statute is arbitrary in that it leaves the determination of the facts to the arbitrary action of the person claiming adversely to the defendant. (Black's Constitutional Law, 2d ed., p. 377 (citing *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. ed. 220); 6 Ruling Case Law, 194; *Miller v. Horton*, 152 Mass. 540, 23 Am. St. 850, 26 N. E. 100, 10 L. R. A. 116; *First Nat. Bank v. Sarlles*, 129 Ind. 201, 28 Am. St. 185, 28 N. E. 434, 13 L. R. A. 481; *Pearson v. Zehr*, 138 Ill. 48, 32 Am. St. 113, 29 N. E. 854.)

"The legislature has no authority to pronounce the performance of an innocent act criminal when the public health, safety, comfort, or welfare is not interfered with." (*Gillespie v. People*, 188 Ill. 176, 80 Am. St. 176, 58 N. E. 1007, 52 L. R. A. 283.)

The act made criminal by this statute is *per se* an innocent act; that is to say, there is no offense, neither does it affect the general welfare, when sheep are herded or grazed upon the public domain. (*Buford v. Houtz*, 133 U. S. 320, 10 Sup. Ct. 305, 33 L. ed. 618; *State v. Dalton*, 22 R. I. 77, 84 Am. St. 818, 46 Atl. 234, 48 L. R. A. 775; *Stearns v. City of Barre*, 73 Vt. 281, 87 Am. St. 721, 50 Atl. 1086, 58 L. R. A. 240; *City of Laurens v. Anderson*, 75 S. C. 62, 117 Am. St. 885, 55 S. E. 136, 9 Ann. Cas. 1003.)

Argument for Respondent.

Under the statute we are considering, it is impossible for a sheep-grower to know even approximately when he is about to violate the statute or has violated the same. (*State v. Conlon*, 65 Conn. 478, 48 Am. St. 227, 33 Atl. 519, 31 L. R. A. 55.)

The sheep-grower cannot know beforehand what he can and cannot do under this statute, because there is no provision in the law whereby it may be determined beforehand that a given section of the country is a cattle range. Neither does it provide any method of establishing or fixing the exact boundary lines of said range. The determination of these two facts is necessary before the sheep-grower can know or before anyone else can know whether or not the statute has been violated. The law is vague, indefinite and uncertain. (*Louisville & N. R. Co. v. Commonwealth*, 99 Ky. 132, 59 Am. St. 457, 35 S. W. 129, 33 L. R. A. 209; *Tozer v. United States*, 52 Fed. 917; *Knight v. Trigg*, 16 Ida. 256, 100 Pac. 1060; *Anderson v. Great Northern R. Co.*, 25 Ida. 433, 138 Pac. 127; *State v. Cudahy Packing Co.*, 33 Mont. 179, 114 Am. St. 804, 82 Pac. 833, 8 Ann. Cas. 717.)

J. H. Peterson, Atty. Genl., T. C. Coffin, Asst., R. G. Adams and William Healy, for Respondent.

"We cannot concede that the police power of the state does not extend over the public domain." (*Sweet v. Ballentyne*, 8 Ida. 431, 69 Pac. 995.)

The privileges which citizens have of grazing their stock upon the public domain are subject to regulation and control on the part of the state governments. (*Buford v. Houtz*, 133 U. S. 320, 10 Sup. Ct. 305, 33 L. ed. 618; *Bacon v. Walker*, 204 U. S. 311, 27 Sup. Ct. 289, 51 L. ed. 499.)

The provisions of the 14th amendment do not apply and were never intended to apply to police regulations enacted by the several states. (*Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. ed. 923; *Minneapolis & St. Louis R. Co. v. Beckwith*, 129 U. S. 26, 29, 9 Sup. Ct. 207, 32 L. ed. 585; *Haigh v. Bell*, 41 W. Va. 19, 23 S. E. 666, 31 L. R. A. 131.)

The necessity and desirability of police regulations are largely matters for the judgment of the legislature. (*Minne-*

Argument by *Amici Curiae*.

apolis & St. Louis R. Co. v. Beckwith, supra; Bacon v. Walker, supra.)

The term "cattle range" has a well-defined popular meaning. "Words that are in common use among the people should be given the same meaning in the statute as they have among the great mass of the people who are expected to read, obey and uphold them." (*Adams v. Lansdon*, 18 Ida. 483, 110 Pac. 280; *Ex parte Bossner*, 18 Ida. 519, 110 Pac. 502; *State v. Stuth*, 11 Wash. 423, 39 Pac. 665.)

L. B. Green, Solon Orr, B. S. Crow and K. I. Perky, as *Amici Curiae*.

A state statute cannot create a possessory right in unoccupied government lands, or regulate the use of such lands. (*Douglas County Commrs. v. Union Pac. Ry. Co.*, 5 Kan. 615, 624; *Oregon Short Line R. Co. v. Quigley*, 10 Ida. 770, 781, 80 Pac. 401; *City of Guthrie v. Beamer*, 3 Okl. 652, 41 Pac. 647; *United States v. Utah Power & Light Co.*, 209 Fed. 554, 126 C. C. A. 376.)

"The disposal of public lands within the state by act of Congress can in no way be limited by state statute." (*United States v. Shannon*, 151 Fed. 863, 866; *David v. Rickabaugh*, 32 Iowa, 540; *Farrington v. Wilson*, 29 Wis. 383, 390.)

The privileges accorded by the United States for grazing upon public lands are subject alone to their control. (*Buford v. Houtz*, 133 U. S. 320, 10 Sup. Ct. 305, 33 L. ed. 618; *Irvine v. Marshall*, 61 U. S. (20 How.) 558, 15 L. ed. 994.)

No state legislature can interfere with this right or embarrass its exercise. (*Gibson v. Chouteau*, 80 U. S. 92, 20 L. ed. 534; *Wilcox v. Jackson*, 38 U. S. 498, 516, 10 L. ed. 264, 273.)

No person may acquire a prior right to pasture the public lands of the United States in the absence of such legislation by Congress. (*McGinnis v. Friedman*, 2 Ida. 393, 17 Pac. 635; *Wilkinson Livestock Co. v. McIlquam*, 14 Wyo. 209, 83 Pac. 364, 3 L. R. A., N. S., 733.)

The federal government alone may prescribe rules and regulations concerning the use of its public lands. (*Forsythe v. United States*, 3 Ind. Terr. 599, 64 S. W. 548; *United*

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States v. Mattock, 2 Sawy. 148, Fed. Cas. No. 15,744; *United States v. Loving*, 34 Fed. 715; *United States v. Hunter*, 4 Mackey (D. C.), 531.)

The federal constitution and the statutes under it recognize no distinction between the different kinds of stock, as creating any difference in right to the use of the public pasture lands. (Brannon's 14th Amendment, pp. 67, 322.)

"Any . . . interruption or deprivation of the common, usual and ordinary use of property is . . . a taking of one's property in violation of the constitutional guaranty." (*Knowles v. New Sweden Irr. Dist.*, 16 Ida. 235, 101 Pac. 87.)

Sec. 6872, Rev. Codes, usurps the judicial power of the courts of this state in that it adjudicates the question of whether appellant has the right to use the public pasture lands of the United States. (*City of Janesville v. Carpenter*, 77 Wis. 288, 20 Am. St. 123, 46 N. W. 128, 8 L. R. A. 808.)

BUDGE, J.—This prosecution was brought in the probate court of Owyhee county, against the defendant, charging him with the commission of a misdemeanor, to wit, herding, grazing and pasturing sheep upon a cattle range in violation of sec. 6872, Rev. Codes.

The case was tried before the court without a jury, a jury trial having been waived, and judgment was pronounced against the defendant finding him guilty as charged.

An appeal was taken to the district court of the third judicial district in and for Owyhee county from said judgment.

After a demurrer to the complaint had been overruled the cause was tried before the court and a jury and a verdict returned finding the defendant guilty as charged in the complaint.

Judgment was pronounced in accordance with the verdict, and it was further ordered that judgment be stayed pending appeal to this court, and that bond in the sum of \$500 be furnished pending said appeal.

Thereafter, defendant filed his motion for new trial, which was denied by order of the court, and an appeal was taken

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to this court both from the judgment and from the order denying defendant's motion for a new trial.

This is a companion case to that of *State v. Horn*, ante, p. 782, and the conclusions reached by this court in that case are decisive of all but one of the questions raised in the case at bar.

In the case at bar counsel for appellant raise an additional question, namely, the uncertainty of sec. 6872, Rev. Codes, *supra*, and consequently its unconstitutionality as a criminal statute. They contend that the statute is vague, indefinite and uncertain, in that it fails to define a cattle range; that it provides no means of determining the character of the range, fixing the exterior boundaries thereof or marking out said boundaries upon the ground; and that it is arbitrary—leaving the determination of the above facts to the arbitrary action of the person or persons claiming adversely to appellant.

The statute in question provides: "Any person owning or having charge of sheep, who herds, grazes, or pastures the same, or permits or suffers the same to be herded, grazed or pastured, on any cattle range previously occupied by cattle, or upon any range usually occupied by any cattle grower, either as a spring, summer or winter range for his cattle, is guilty of a misdemeanor; *but the priority of possessory right between cattle and sheep owners to any range, is determined by the priority in the usual and customary use of such range, either as a cattle or sheep range.*"

This statute was enacted by the 12th session of the territorial legislature of 1883. It was part of an act entitled "An act for the protection of stock-growers in Owyhee, Boise, Oneida, Bear Lake, Lemhi and Custer counties." It was re-enacted as sec. 6872, Rev. Stat. of 1887. The statute was continued in force by sec. 2 of the schedule and ordinance contained in art. 21 of the state constitution; and the state constitution, together with the schedule, was approved by the federal government at the time Idaho was admitted as a state.

While, it is true, this section of the statutes has never been before this court for construction, yet it has been for thirty-

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two years accepted to a greater or less extent by the industries of the state affected thereby. The terms of the statute, by reason of the fact that it has been part of the law of this state during all these years, have a well-defined meaning. The fact that a statute has been in force for many years, and, the presumption is, obeyed by the citizens of the state, and received a practical interpretation, unless its language is so obscure and doubtful that it is entitled to no weight or consideration, may be urged as an additional reason why the most careful consideration should be given to the questions involved in its interpretation and application where it is contended that it is in conflict with the constitution.

It has been said by respectable authority that a construction of a statute which has for a third of a century been accepted by everyone as so obviously correct as never to have been questioned is much more likely to be right than a newly discovered one suggested by the emergencies of current litigation. (*Willis v. Mabon*, 48 Minn. 140, 31 Am. St. 626, 50 N. W. 1110, 16 L. R. A. 281.) This principle has been applied in upholding statutes the constitutionality of which was not attacked until after sixty years, fifty years, forty-five years, forty years, thirty years, and even twenty years. (*McPherson v. Secretary of State*, 92 Mich. 377, 31 Am. St. 587, 52 N. W. 469, 16 L. R. A. 475; *Hill v. Tohill*, 225 Ill. 384, 80 N. E. 253, 8 Ann. Cas. 423; *Butte City Water Co. v. Baker*, 196 U. S. 119, 25 Sup. Ct. 211, 49 L. ed. 409; *Baker v. Butte City Water Co.*, 28 Mont. 222, 104 Am. St. 683, 72 Pac. 617.)

Courts approach constitutional questions with great deliberation, exercising their power in this respect with the greatest possible caution and even reluctance, and should never declare a statute void unless its invalidity is, in their judgment, beyond a reasonable doubt. (*State v. Pioneer Nurseries Co.*, 26 Ida. 332, 143 Pac. 405.)

So far as statutes fairly may be construed in such a way as to avoid doubtful constitutional questions they should be so construed. (*United States v. Delaware & Hudson Co.*, 213 U. S. 366, 29 Sup. Ct. 527, 53 L. ed. 836.)

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There is also an established rule of statutory construction that where there are two constructions that may be fairly given a legislative act designed to affect a great public purpose, one of which will carry out the intent and purpose, and the other will defeat the intent and purpose of the act, the former construction should be applied. (*Imperial Irr. Co. v. Jayne*, 104 Tex. 395, 138 S. W. 575, 582, Ann. Cas. 1914B, 322.)

In the case of *Adams v. Lansdon*, 18 Ida. 483, 110 Pac. 280, the following language is used by this court:

“Laws are enacted to be read and obeyed by the people, and in order to reach a reasonable and sensible construction thereof, words that are in common use among the people should be given the same meaning in the statute as they have among the great mass of the people who are expected to read, obey and uphold them.”

In the case of *State v. Stuth*, 11 Wash. 423, 39 Pac. 665, a penal statute providing that every person who disturbs any religious society, when meeting together in public worship, shall be fined, was attacked on the ground that it was invalid for uncertainty in that it failed sufficiently to define the crime. It was held that the statute was not uncertain, the words “disturb” and “religious society” being used in their ordinary sense.

In *Foster v. State*, 21 Tex. App. 80, at p. 87, 17 S. W. 548, the court had under consideration a similar statute. It was objected in that case that the range was not set out or described in the indictment. It was held that the term “range” as used in the statute is a matter of local description, and unlike a generic term requiring the species to be stated, it admits of proof under the general allegation, without defining by averment the limits of the range.

See, also, case of *Fox v. State of Washington*, 236 U. S. 273, 35 Sup. Ct. 383, 59 L. ed. 000.

The word “range” is defined in the Century Dictionary and Cyclopedia, p. 4955, subdiv. 7, as “A tract or district of land within which domestic animals in large numbers range

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for subsistence; an extensive grazing ground; used on the great plains of the United States for a tract commonly of many square miles, occupied by one or by different proprietors, and distinctly called a cattle, stock, or sheep range. The animals on a range are usually left to take care of themselves during the whole year without shelter, excepting when periodically gathered in a 'round-up' for counting and selection, and for branding when the herds of several proprietors run together."

A cattle range in this state has a well-defined meaning, and so has a sheep range; and this meaning is fully recognized by persons engaged in the two industries.

While it might be possible for sheep to graze upon a cattle range, it is well known to all stock-growers that sheep and cattle will not range together, and that cattle and horses will not range on a sheep range. Thus legislation to protect sheep against cattle and horses is wholly unnecessary.

It is also well known to stock-growers that cattle and horses have their accustomed range, to which they go, if permitted, of their own volition, and upon which they range, and where they can be found by the owners.

It is a matter of common knowledge that horses and cattle are left upon a cattle range receiving but little care and attention during the summer months by their owners; while sheep are constantly under the care of herders and dogs. Moreover, that a camp-tender is employed in connection with the care and herding of sheep, among whose duties is the riding of the range for the purpose of locating suitable area upon which to drive, herd and graze the sheep of his employer.

Sheep require much less water while grazing than cattle, and it therefore becomes necessary for cattle and horse owners to occupy portions of the public domain upon which there are streams and springs of water to which their animals may have ready access.

The above are all very good reasons why it is imperative that the public domain within the jurisdiction of the state be properly regulated as between these two necessary and needful industries. Sec. 6872, Rev. Codes, is a police regula-

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tion, and to our minds it clearly appears that it was the intention of the legislature, in the enactment of said section, to preserve the tranquility of the citizens of the state; to avoid "range wars"; and to promote the peace, quiet and general welfare of the citizens.

This statute must necessarily be construed with, and as a part of, sec. 6314, Rev. Codes, which latter section provides: "In every crime or public offense there must exist a union, or joint operation, of act and intent, or criminal negligence." In other words, there must be an intent to violate said sec. 6872, *supra*, as well as the act of driving or herding sheep upon a cattle range; or the failure upon the part of the defendant by the exercise of ordinary diligence to ascertain whether or not the range upon which he drives, herds and grazes his sheep is a cattle range within the meaning of said section.

The appellant insists in his argument that sec. 6872, Rev. Codes, is void because it fails to describe the exterior limits of a cattle range, and for that reason it is impossible for a citizen herding sheep to determine when he has crossed the exterior limits of the cattle range.

The statute says: "*The priority of possessory right between cattle and sheep owners to any range, is determined by the priority in the usual and customary use of such range, either as a cattle or sheep range.*" Priority of possession, or priority of right, or the first in time is the first in right, are all common, ordinary, every-day expressions and have a well-defined meaning. The priority of right to the use of the range as between cattle and sheep owners depends upon the prior use in the usual and customary manner. Thus, if the range is used by cattle owners and has been so constantly used prior to its use by sheep owners, the right to the use is established by proof of such priority.

Where the owner of sheep knows, or by the exercise of ordinary care is able to ascertain, that a certain given area of the public domain has been used and is then being used as a cattle range, and he wilfully and knowingly herds, drives and grazes his sheep upon such cattle range, it then becomes

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his willful and unlawful act or trespass, and he is clearly amenable to the statute.

These being questions of fact, are for the jury to determine, the same as would be the questions of fact in any other ordinary criminal prosecution. The intention to commit the act, as well as the commission of the act, are necessary and essential ingredients of the crime; and if both are established by competent evidence, under proper instructions, such as from our examination were given in this case, in our opinion, the verdict of the jury should not be disturbed.

We think we have disposed of the question that a cattle-grower can arbitrarily fix the limits or boundaries of the range. Both the limits and boundaries of the range are determined by priority of possession and use of the range by the cattle-grower in the usual and customary use of a cattle range, and are questions of fact for the jury. The cattle-grower can neither enlarge nor diminish the area at will; but must establish by competent evidence and beyond a reasonable doubt that the defendant in charge of the sheep wilfully and unlawfully herded, grazed or pastured them upon a cattle range, as heretofore defined; that said range had been previously occupied by cattle, or was occupied by cattle-growers either as a spring, summer or winter range for their cattle, and that they, or their predecessors in the cattle business, had made the usual and customary use of such area of country as a cattle range, prior to any use thereof, in the usual and customary manner, as a sheep range, and that said range had not been abandoned as a cattle range; and that the defendant knew, or had information from which a reasonable man under like circumstance would have known, that he was herding, grazing or pasturing sheep upon a cattle range previously occupied by cattle in the usual and customary use of such range, and that sheep had not been herded, grazed or pastured upon said range prior to said time in the usual and customary use of said range.

The character and area of a cattle range are to be determined by its priority of use in the usual and customary manner as such.

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We agree with learned counsel for appellant and those who appeared as *amici curiae* that all criminal statutes should be certain and definite in their terms, and commend the zeal and effort displayed by counsel in behalf of the appellant in their presentation of this case. And we are frank to admit that sec. 6872, Rev. Codes, is not as certain and definite in its terms as are the more recent statutes covering the police power. However, we have reached the conclusion that in view of the peculiar conditions existing in this state prior to the enactment of that statute (as recited in the various opinions of this court and referred to in the case of *State v. Horn, supra*), occasioned by a sharp conflict between the sheep and cattle industries and between the sheep and farming industries, it was properly deemed necessary by the legislature, in order to promote the general welfare, peace, quiet and tranquility of the citizens, to enact such a statutory provision regulating the use of the public domain within the jurisdiction of the state.

From the conclusions we have reached, we are of the opinion that sec. 6872, Rev. Codes, is not void for indefiniteness and uncertainty, and that it does not permit the cattle-grower to arbitrarily fix the limits or boundaries of the cattle range. Whatever hardships, if any, are imposed upon either the stock or sheep industry by reason of this law are to be remedied by the legislative and not the judicial branch of our state government.

The judgment of the lower court is affirmed.

Sullivan, C. J., and Morgan, J., concur.

Petition for rehearing denied.

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APPEAL AND ERROR.

Time for Appeal.

1. Sec. 4807, Rev. Codes, as amended by chapter 111, Session Laws 1911, page 367, limits the time within which an appeal may be taken to the supreme court from a judgment rendered in a district court or an appeal from an inferior court to sixty days from the entry of judgment, and this court is without power to enlarge the time so fixed. (Chapman v. Boehm, 150.)

Notice of Appeal.

2. Under the provisions of sec. 4808, Rev. Codes, the notice of appeal must be served upon every party to the action not appealing whose interests might be affected by the reversal or modification of the judgment, irrespective of whether they are plaintiffs, defendants or intervenors. (State Bank of Clarkston v. Watson, 211.)

3. Under the provisions of sec. 4808, Rev. Codes, the notice of appeal must be served upon every party to the action not appealing whose interest might be affected by a modification or reversal of the judgment, irrespective of whether they are plaintiffs, defendants or intervenors. (Bridgham v. National Pole Co., 214.)

4. Sec. 4808, Rev. Codes, provides the manner of taking an appeal and that service of notice thereof must be made on the adverse party or his attorney. Said section requires such notice to be served upon each party whose interest would be affected by modification or reversal of the judgment, and it must appear from the

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transcript that such notice has been so served or the appeal will be dismissed upon motion. (*Chapman v. Boehm*, 150.)

Transcript.

5. Under the provisions of sec. 4434, Rev. Codes, as amended by chap. 119, Laws 1911, p. 379, in order to review the matter contained in the stenographer's transcript, such transcript must be settled by the judge. (*Chapman v. A. H. Averill Machinery Co.*, 213.)

6. The rules of practice in this court provide that within sixty days after an appeal is perfected the transcript of the record must be filed in this court, and that written evidence of the service thereon upon the adverse party shall be filed therewith; also, that if the said transcript is not filed within the time prescribed, the appeal may be dismissed on motion, without notice. (*State v. Jewett*, 147.)

Briefs—Assignment of Error.

7. Where assignments of error are set out in counsel's brief as prescribed by the rules of this court, but are not discussed either in the brief or upon oral argument, and where no authorities are cited in support of said assignments of error, the same will not be considered or determined by this court. (*Davenport v. Burke*, 464.)

8. Where specifications of error appear for the first time in counsel's brief, upon an appeal from a judgment and from an order denying a new trial, and do not appear in the transcript or in appellant's application for a new trial, such specifications of error will not be considered. (*State v. Bouchard*, 500.)

9. The purpose of the provision in the rules of practice that appellant's brief shall contain a distinct enumeration of the several errors relied on is to require appellant to inform respondent and this court what action of the trial court is relied upon for a reversal of the judgment or order appealed from, and when it is stated in appellant's brief that the appeal is from the order granting a new trial, and when no other action of the trial court is complained of, the appeal will be considered upon its merits, although appellant's brief does not contain an assignment of errors in the usual form. (*Smith v. Wallace National Bank*, 441.)

10. Under the provisions of rule 45 of the rules of this court, the brief of appellant must contain a distinct enumeration of the several errors relied upon. (*Farnsworth v. Pepper*, 159.)

11. Attorneys must comply with the rules of this court in the service and filing of their briefs, and in case more time is required than the rules allow for serving such briefs, application should be

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made for an extension of time before the time given has expired. (Collman v. Wanamaker, 342.)

12. A motion will be sustained to strike from the files, briefs couched in language disrespectful to the court and court officers, and unbecoming an attorney and officer of the court. (Anderson v. Coolin, 334.)

Review—Affirmance or Reversal—Conflicting Evidence.

13. The contention that an action has been prematurely brought cannot be successfully made for the first time upon appeal, but must be made first in the trial court. (State v. Title Guaranty and Surety Co., 752.)

14. A judgment will not be reversed by reason of an error or defect in the pleadings or proceedings which does not affect the substantial right of the parties. (Schultz v. Rose Lake Lumber Co., 528.)

15. In considering the questions raised on an appeal from an order of the trial court sustaining a demurrer to the complaint, the truth of every material allegation of the complaint which is well pleaded must be deemed to be admitted by the demurrer. (Blackwell v. Kercheval, 537.)

16. Where the record does not show the ground upon which a new trial was granted, and no error warranting it appears, the order granting it will be reversed upon appeal. (Smith v. Wallace National Bank, 441.)

17. Where there is evidence to sustain the verdict and there is a substantial conflict in the evidence, the verdict will not be disturbed. (State v. Nesbit, 4 Ida. 548, 43 Pac. 66; State v. Silva, 21 Ida. 247, 120 Pac. 835; State v. Downing, 23 Ida. 540, 130 Pac. 461; State v. Hopkins, 26 Ida. 741, 145 Pac. 1095, approved and followed. (State v. Bouchard, 500.)

18. Where there is a substantial conflict in the evidence, a judgment based upon a verdict will not be disturbed upon appeal. (Graham v. Coeur D'Alene & St. Joe Transportation Co., 454.)

19. The record in this case examined and found to come well within the established rule in this state that where there is a substantial conflict in the evidence, the appellate court will not disturb the findings or judgment of a trial court. (Smith v. Farris-Kesl Construction Co., 407.)

20. Where there is a substantial conflict in the evidence, the findings of the court will not be disturbed. (Bower v. Moorman, 162.)

APPEAL AND ERROR (Continued).***Appeal from Police to District Court.***

21. Where certain persons were convicted of violation of the anti-gambling ordinance of a village before a justice of the peace acting as police magistrate of such village, and appealed from such judgment of conviction to the district court, such appeal being taken as prescribed by law, the jurisdiction of the justice of the peace acting as police magistrate ceased upon such appeal being perfected, and the jurisdiction of the district court attached. (*State v. Hosford*, 185.)

22. Where a writ of review is issued by a district judge, directed to a justice of the peace acting as police magistrate, seeking to review a judgment of conviction in said police magistrate's court from which a valid appeal had already been taken to the district court, *held*, that the issuance of such writ was a futile thing, as the case was already pending in the district court for trial *de novo*, and the district court did not err in dismissing such writ of review (*State v. Hosford*, 185.)

Dismissal of Appeal.

23. *Held*, that the motions to dismiss must be sustained. (*Wilds v. Brown*, 218.)

Frivolous Appeal—Damages.

24. Since the appeals were manifestly taken for delay, twelve per cent penalty for damages is allowed under the provisions of rule 44 of the rules of this court. (*Wilds v. Brown*, 218.)

APPEARANCE.***How Made—Notice.***

1. Sec. 4892, Rev. Codes, provides that "a defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of his appearance, or when an attorney gives written notice of appearance for him. . . ." (*Domer v. Stone*, 279.)

2. The written notice of appearance contemplated by said section is a statement in writing by the defendant or his attorney whereby the plaintiff is informed that the defendant has appeared, generally or specially, in the case and has submitted himself to the jurisdiction of the court. (*Domer v. Stone*, 279.)

3. A motion that a nonresident plaintiff be required to give security for costs is not an appearance as contemplated by said section. (*Domer v. Stone*, 279.)

4. In a case where such a motion has been made and such security has been given, if the defendant fails to appear, as provided in said sec. 4892 within the time specified in the summons, his default may be properly entered. (*Domer v. Stone*, 279.)

APPEARANCE (Continued).

5. A nonresident plaintiff upon whom demand for security for costs has been made is not required to give notice to the defendant when such security is given, neither is the defendant, who has failed to appear, entitled to other or additional notice than that contained in the summons that the plaintiff will apply for a default against him. (*Domer v. Stone*, 279.)

APPROPRIATIONS.*Necessity for Before Money may be Drawn.*

1. Sec. 13, art. 7, of the state constitution, provides that no money shall be drawn from the treasury but in pursuance of the appropriations made by law. (*Evans v. Huston*, 559.)

2. The first section of the appropriation act of 1913 (Sess. Laws 1913, p. 637) makes an appropriation for the support and maintenance of the several state institutions for the period commencing on the first Monday in January, 1913, and ending on the first Monday of January, 1915, and provides "That the amounts specifically appropriated for stated purposes by this act constitute the whole amount appropriated and to be used for any purposes during the years 1913 and 1914." (*Evans v. Huston*, 559.)

3. Said sec. 13, art. 7, of the constitution, prohibits the state auditor from drawing his warrant upon any fund in payment of any claim until a proper legislative appropriation is made for the payment of such claim. (*Evans v. Huston*, 559.)

ARCHITECTS.

See Contracts, 2, 3.

ARTESIAN WELLS.

See Waters and Watercourses, 16-26.

ATTORNEYS.*Admission to Practice—Nonresidents.*

1. Section 3990, Rev. Codes, provides: "Any citizen or person, resident of this state, or who has *bona fide* declared his intention to become a citizen in the manner required by law, of the age of twenty-one years, of good moral character, and who possesses the necessary qualifications of learning and ability, is entitled to admission as attorney and counselor in all courts of this state." But, before being admitted as such attorney and counselor, as provided by sec. 3991, Rev. Codes, as amended by Sess. L. 1909, p. 110, "must produce satisfactory testimonials of good moral character and . . . undergo a strict examination in open court as to his qualifications, by the justices of the supreme court." Sec. 3994,

ATTORNEYS (Continued).

Rev. Codes, as amended by Sess. L. 1911, p. 338, provides: "The examination may be dispensed with in the case of any person who has been admitted to practice law under license or certificate from the highest court of another state or territory, and has thereafter actually engaged in the practice of law as a principal occupation for not less than three years immediately preceding with [the] date of application for admission to practice in this state, and who is in good standing as such." (Anderson v. Coolin, 334.)

2. Sec. 3995, Rev. Codes, provides: "Each clerk must keep a roll of attorneys and counselors admitted to practice by the court of which he is clerk, which roll must be signed by the person admitted before he receives a license." (Anderson v. Coolin, 334.)

3. Sec. 3996, Rev. Codes, provides in substance that if any person shall practice law in this state in any court, except a justice's court, without having received a license as attorney and counselor, he is guilty of a contempt of court. (Anderson v. Coolin, 334.)

4. Under the amendment to sec. 3991, Rev. Codes, *supra*, the admission of attorneys of sister states and territories to practice in all the courts of this state is placed wholly within the jurisdiction of the supreme court of this state, and the law does not authorize the admission of such attorneys by the district courts. (Anderson v. Coolin, 334.)

5. Subdivision 4 of sec. 4002, Rev. Codes, provides, as one of the causes for which an attorney may be disbarred or suspended: "Lending his name to be used as an attorney and counselor by any other person who is not an attorney and counselor," and regularly admitted to practice. (Anderson v. Coolin, 334.)

6. Sec. 4198, Rev. Codes, provides: "All pleadings filed in the district courts or supreme court of this state shall be signed by a resident attorney of the state of Idaho, who shall state his residence or postoffice address; and the name of a resident attorney shall be indorsed on all summons issued out of the district courts, and all pleadings required to be verified shall be verified by a party to the action, or any attorney residing in the state of Idaho and regularly admitted to practice in the courts of this state." (Anderson v. Coolin, 334.)

7. Nonresident attorneys, who are admitted to practice in this state under section 3994, Rev. Codes, as amended, *supra*, in order that they may be permitted to appear in the courts of this state, must associate with them a resident attorney who has been regularly admitted to practice in the courts of this state, who shall be held primarily responsible by, and answerable to, the courts of this state, for all proceedings had in connection with the litigation in which they are so employed before the courts of this state. Said employ-

ATTORNEYS (Continued).

ment of a resident attorney is not to be a mere subterfuge, but *bona fide* and in good faith, and for which services, said attorney is entitled to charge and receive adequate compensation. (Anderson v. Coolin, 334.)

8. Upon motion, an order will be made by this court striking the name of a person who has not been regularly admitted to practice in the courts of this state, or by comity extended upon application by the court, from all original files and briefs, where the name of said person appears; and he will be denied the right to appear in this court, or the district courts of this state, as an attorney and counselor, until he has fully complied with all of the requirements of the statutes of this state governing the admission of attorneys and counselors to practice law in this jurisdiction. (Anderson v. Coolin, 334.)

See Trial, 1.

AUDITOR.

See State Auditor.

BANK COMMISSIONER.

See Banks and Banking, 3, 4.

BANKS AND BANKING.**Cashiers.**

1. While it is a general rule that a bank is bound to take notice of facts pertaining to its business within the knowledge of its cashier, there are exceptions to the rule, and it is not bound by notice of facts relating to an independent fraudulent act which the cashier is committing on his own account, the communication of which would prevent the consummation of the fraud, nor when he is openly acting on his own behalf, or on behalf of another in a transaction with the bank. (Smith v. Wallace National Bank, 441.)

2. *Held*, that under the facts in this case the appellants are not liable for the acts of the cashier in conducting the business entrusted to him by respondent's testatrix. (Smith v. Wallace National Bank, 441.)

Bank Commissioner—Investigations.

3. The law invests a bank commissioner with discretion while he is making his investigation and up to the point where he reaches the conclusion and becomes satisfied that the bank has unlawfully refused to pay its depositors and has become insolvent, but at this point his discretion ends and it becomes his mandatory duty to close it, a duty the failure to perform which renders him and the

BANKS AND BANKING (Continued).

surety upon his official bond liable to depositors who lose their money as a direct result thereof. (*State v. Title Guaranty and Surety Co.*, 752.)

4. The provisions of secs. 73 and 74, chap. 124, Sess. Laws 1911, *held*, not to be in contravention of the 14th amendment of the constitution of the United States nor of sec. 13, art. 1, nor secs. 2 and 13, art. 5, of the constitution of Idaho. (*State v. Title Guaranty and Surety Co.*, 752.)

National Banks—Corporate Existence—Pleading.

5. Where the corporate existence of a national bank, which is plaintiff in an action, is alleged in the complaint and denied on information and belief in the answer, such denial is not sufficient to put in issue such allegation, since the corporate existence of national banks is a matter of public record. (*First National Bank of Iowa City v. Walker*, 199.)

6. *Held*, that the court erred in holding that the corporate existence of a national bank could be proved only by its articles of incorporation. (*First National Bank of Iowa City v. Walker*, 199.)

7. Courts will take judicial notice of the general laws of the United States in regard to the incorporation of national banks, which laws indicate that such banks are to be regarded as public institutions, and such banks, when parties to a suit, may prove by parol that they were carrying on a general banking business authorized by the general laws of the United States. (*First National Bank of Iowa City v. Walker*, 199.)

BONDS.

See *Municipal Corporations*, 12; *Principal and Surety*.

BOUNDARIES.**Determination of.**

1. *Held*, that upon a former hearing this case was remanded to the trial court in order that "permanent and lasting monuments" might be established upon the dividing line between the lots in controversy, in accordance with the findings and decree of the trial court, and not for the purpose of making any change in such line, as found by the trial court to be the true line between said lots. (*Brinton v. Steele*, 193.)

2. The evidence *held* sufficient to support the finding of facts. (*Zehner v. Castle*, 215.)

BRIEFS.

See *Appeal and Error*, 7-12.

CANAL CONSTRUCTION.

See Contract.

CANALS.

See Damages; Eminent Domain; Irrigation; Municipal Corporations.

CAREY ACT.

See Irrigation, 9.

CASHIERS.

See Banks and Banking, 1, 2.

CATTLE INDUSTRY.

See Constitutional Law, 4-10.

CHAMBERS.

See Judges.

CHANCE VERDICT.

See Jury, 3.

CHANGE OF VENUE.

See Venue, 1.

CHATTEL MORTGAGES.***Foreclosure—Pleading.***

1. Sec. 3413, Rev. Codes, as amended (Sess. L. 1909, p. 149), provides: "In proceeding to foreclose by notice and sale, the mortgagee, his agent or attorney, must make an affidavit stating the date of the mortgage, the names of the parties thereto, a full description of the property mortgaged, and the amount due thereon. Such affidavit shall be sufficient authority to demand and receive possession of the property, if the same can be taken peaceably, but if it cannot be so taken, then such affidavit must be placed in the hands of the sheriff of the county or the constable in the precinct where the property is located, together with a notice signed by the mortgagee, his agent or attorney, requiring such officer to take the mortgaged property into his possession and sell the same." (*Tap-pin v. McCabe*, 402.)

2. *Held*, that where the plaintiff failed to allege in his amended complaint that the mortgagee, his agent or attorney made an affidavit as required by sec. 3413, Rev. Codes, as amended by Sess. Laws 1909, p. 149, and upon such affidavit demanded the possession of the property described in the chattel mortgage which he sought

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CHATTEL MORTGAGES (Continued).

to foreclose by affidavit and notice, which demand was thereupon refused by the mortgagor, and by reason thereof such affidavit and notice was placed in the hands of the sheriff, said amended complaint was subject to a general demurrer upon the ground that the same did not state facts sufficient to constitute a cause of action. (Tappin v. McCabe, 402.)

3. *Held*, that it was incumbent upon the plaintiff to allege in his amended complaint that he had fully complied with sec. 3413, Rev. Codes, as amended by Sess. Laws 1909, p. 149, before a right of action could be maintained against the defendant as sheriff, for his failure or refusal to take into his possession the personal property described in the chattel mortgage under an affidavit and notice of sale, and sell the same. (Tappin v. McCabe, 402.)

CITIES AND TOWNS.

See Municipal Corporations.

CITY HALL.

See Municipal Corporations, 12.

CONDEMNATION PROCEEDINGS.

See Eminent Domain.

CONFLICTING EVIDENCE.

See Appeal and Error, 13-20.

CONSTITUTIONAL LAW.***In General.***

1. In passing upon the constitutionality of statutes generally, no matter from what standpoint the assault thereon may be made, nothing but a clear violation of the constitution will justify the courts in overruling the legislative will, and where there is reasonable doubt as to the constitutionality of an act, it must be resolved in favor of the act. (Ingard v. Barker, 124.)

2. The legislative body existing by virtue of a constitutional provision has power to enact any laws that are not expressly, or by necessary implication, prohibited either by the federal constitution or the constitution of this state. (Ingard v. Barker, 124.)

3. The equality clause of the federal constitution, as embodied in the 14th amendment, is not necessarily infringed by legislative classification of persons or things. This clause only requires that the same means and methods be applied impartially to all the constituents of a class, so that the law may operate equally and uni-

CONSTITUTIONAL LAW (Continued).

formly upon all persons in similar circumstances. (*State v. Horn*, 782.)

Regulation of Sheep and Cattle Industry.

4. The owners of sheep, equally with all other citizens of the state, are entitled to the use of the public domain within the jurisdiction of the state, subject to the right of the state in the exercise of its police power to control and regulate such use. (*State v. Horn*, 782.)

5. The control and regulation of the various industries of the state under a proper exercise of the police power rests with the legislative department of the state government, and it is only against a palpable abuse of the power that the courts may interpose. If, in the judgment of the legislature, and in order to protect the public health, public morals or public safety, or to enhance the general prosperity of the citizens, any particular industry requires protection or regulation upon the public domain within the state, such protection or regulation may be afforded by a proper legislative enactment. (*State v. Horn*, 782.)

6. It is within the constitutional prerogative of the legislature, in the exercise of the police power of the state, to minimize the opportunities for conflict between the sheep and cattle industries, to the extent of prohibiting sheep from running "on any cattle range previously occupied by cattle, or upon any range usually occupied by any cattle grower, either as a spring, summer or winter range for his cattle," as provided in sec. 6872, Rev. Codes. (*State v. Horn*, 782.)

7. The lands constituting the public domain of the United States within the jurisdiction of this state are subject to the police regulations of the state, as expressed in legislative enactments, the same as the lands of any citizen of the state, so far as such laws and regulations are not in conflict with the federal constitution or statutes; and until Congress provides by law that sheep shall not be restricted by state laws from grazing anywhere upon the public domain, the state, by proper legislation, may regulate and control that matter. (*State v. Horn*, 782.)

8. Individuals engaged in the sheep industry are not entitled to claim that the same legislative restrictions and privileges be applied to that industry as to rival industries, such as the horse or cattle industry. The habits and nature of these animals being different, as well as the results which follow from their use of land for grazing purposes, it is competent for the legislature to take these differences into consideration and to provide for them by regulations designed to meet existing conditions in each particular industry. When the law under consideration treats all individuals of

CONSTITUTIONAL LAW (Continued).

the class of sheep-men alike under similar circumstances and conditions, both as regards the privileges conferred and the liabilities imposed, it is not class or special legislation, and is not obnoxious to the provisions of sec. 1, art. 1 of the state constitution which enumerates, among the inalienable rights of the citizen, the "acquiring, possession and protecting property." (State v. Horn, 782.)

9. This is a companion case to that of *State v. Horn et al.*, ante, p. 782, and the conclusions reached by this court in that case are decisive of all but one of the questions raised in the case at bar, viz., the uncertainty of sec. 6872, Rev. Codes, and consequently its unconstitutionality as a criminal statute. (State v. Omaechevvaria, 797.)

10. Sec. 6872, Rev. Codes, is a police regulation and must necessarily be construed with and as a part of sec. 6314, Rev. Codes, which provides: "In every crime or public offense there must exist a union, or joint operation, of act and intent, or criminal negligence." In other words, there must be an intent to violate sec. 6872, Rev. Codes, *supra*, as well as the act of driving or herding sheep upon a cattle range, in order to warrant a conviction of the defendant. (State v. Omaechevvaria, 797.)

See Eminent Domain; Intoxicating Liquors.

CONTINUANCES.

In General.

1. The granting or refusing to grant a continuance of a case is largely in the sound discretion of the trial court, and *held*, in this case, that under the facts presented by the affidavits for a continuance, the court did not abuse its discretion in refusing to grant a continuance. (Corey v. Blackwell Lumber Co., 460.)

2. *Held*, that the court erred in refusing to admit certain affidavits made for a continuance, where the state, in order to avoid a continuance, admitted that if the witnesses named in the affidavits were present, they would testify as set forth in the affidavits. (State v. Clark, 48.)

CONTRACTS.

For Canal Construction.

1. The classification of different kinds of material removed in the construction of a canal was the subject of difference of opinion between expert witnesses, and a trial court is not required to adopt, as a whole, the estimates or opinions of certain witnesses as against those of other witnesses. (Smith v. Faris-Kesl Construction Co., 407.)

CONTRACTS (Continued).

2. It is a well-established rule of law that where the contract provides that an engineer or architect shall be the umpire, or final arbitrator, between the parties should disagreement arise between them growing out of the contract, in the absence of fraud or mistake or such undue influence or collusion as amounts to fraud, in making the estimates of the amount of work performed under the contract, the parties thereto are bound by such estimates. (Smith v. Faris-Kesl Construction Co., 407.)

3. In this case it was not stipulated in the contract that the estimates of the engineer should be final, binding or conclusive upon the parties; therefore such estimates were subject to attack for inaccuracy, and it was proper for the trial court to consider all the evidence offered and admitted touching the amount, character and classification of material handled by the respondent in the construction of the canal. (Smith v. Faris-Kesl Construction Co., 407.)

See Counties, 7, 8; Work and Labor; Logs and Logging.

CONVEYANCES.

See Deeds.

CORPORATIONS.

See Public Utilities Commission.

COSTS.***In General.***

1. The right to recover costs is statutory, and the prevailing party cannot recover his costs unless he conform to the provisions of the statute. (Smith v. Faris-Kesl Construction Co., 407.)

2. The phrase, "decision of the court," as used in sec. 4912, Rev. Codes, refers to a formal decision, or findings of fact, conclusions of law and decree, or judgment, and a memorandum of costs and disbursements filed prior to the making of such formal decision is prematurely filed, and a motion to strike the same from the files upon that ground should be sustained. (Smith v. Faris-Kesl Construction Co., 407.)

COUNTIES.***Newly Organized Counties—Indebtedness.***

1. The general laws of the state applicable to new counties authorize them to cause to be transcribed certain records; to provide furniture, fixtures, record books, etc., and to provide county jails. The ordinary and necessary expenses of a new county include expenditures for these purposes and the county commissioners are not prohibited from making such expenditures, when necessary, in

COUNTIES (Continued).

order to place the county government in operation, without submitting the question to a vote of the electors, even though the indebtedness thereby incurred exceeds the income and revenue provided for the county for that year. (*Jones v. Power County*, 656.)

2. Although the act of the legislature creating a new county provides that its commissioners shall make provision for the payment of any bonded indebtedness which may be apportioned to it, by levy and taxation at the time fixed by law for so doing, and in the same manner as the commissioners of the counties from which its territory is derived, should or could have done, that method of taking care of such indebtedness is not exclusive, and it was competent for the legislature to and it did permit the additional method provided in chap. 20, Sess. Laws 1915. (*Jones v. Power County*, 656.)

3. Chap. 20, Sess. Laws 1915, provides a means whereby the warrant indebtedness of counties, situated as is Power, may be extinguished by the issuance of funding bonds, and that chapter governs this case. (*Jones v. Power County*, 656.)

4. A statute is general if its terms apply to, and its provisions operate upon, all persons and subject matters in like situation. Chap. 20, Sess. Laws 1915, examined and held to not contravene sec. 5 of art. 18 or sec. 19 of art. 2 of the constitution of Idaho, providing that "the legislature shall establish, subject to the provisions of this article, a system of county government which shall be uniform throughout the state; and by general laws shall provide for township or precinct organization"; also "the legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: . . . Regulating county and township business or the election of county and township officers." (*Jones v. Power County*, 656.)

Salaries of Officers.

5. Sec. 7 of art. 18 of the constitution of Idaho, which provides: "All county officers and deputies when allowed, shall receive, as full compensation for their services, fixed annual salaries, to be paid quarterly out of the county treasury, as other expenses are paid, . . . " was adopted and amended in view of and in order to conform to the established plan of county government which contemplates that the board of county commissioners shall have supervisory power over all county matters, and which provides, among other things, for a settlement between the board and the county officers quarterly, to the end that the officers shall be paid such sums; and such sums only, as may be found to be due to them from the county after deducting all sums due to the county from them. (*Leonard v. St. Clair*, 568.)

COUNTIES (Continued).

6. The attempted amendments of sec. 2115, Rev. Codes, whereby county officers' salaries are payable monthly instead of quarterly are in contravention of sec. 7 of art. 18 of the constitution of Idaho, and are void. (*Leonard v. St. Clair*, 568.)

Awarding of Contracts—Public Offense.

7. An indictment which fails to allege that a county commissioner was interested directly or indirectly in a contract awarded by the board of county commissioners of which he was a member, or in the benefits to be derived therefrom, at the time said contract was awarded, is insufficient, and fails to state any fact or facts sufficient to constitute a public offense under the provisions of sec. 88-b, Sess. Laws 1911, p. 169. (*In re Howell*, 590.)

8. *Held*, that the indictment in this case is insufficient, and the demurrer should have been sustained. (*In re Howell*, 590.)

COURTS.***Jurisdiction of District and Probate and Justices' Courts—Misdemeanors.***

1. Sec. 20, art. 5, of the constitution, provides: "The district court shall have original jurisdiction in all cases, both at law and in equity, and such appellate jurisdiction as may be conferred by law." (*Fox v. Flynn*, 580.)

2. Sec. 13, art. 5, of the constitution, provides: "The legislature shall have no power to deprive the judicial department of any power or jurisdiction which rightly pertains to it as a co-ordinate department of the government; but the legislature shall provide a proper system of appeals, and regulate by law, when necessary, the methods of proceeding in the exercise of their powers of all the courts below the supreme court, so far as the same may be done without conflict with this constitution." The above provision of the constitution is a restriction upon the power of the legislature to limit the jurisdiction conferred by the constitution on the judicial department of the state. The legislature has no power to prescribe a jurisdiction for the district courts of the state less broad than contained in sec. 20, art. 5, of the constitution. (*Fox v. Flynn*, 580.)

3. It is the settled law of this state, under sec. 20, art. 5, and the decisions of this court, construing said section of the constitution, that district courts have original jurisdiction in all misdemeanor cases, including such misdemeanors as are cognizable in the first instance by probate and justices' courts. (*Fox v. Flynn*, 580.)

4. Sec. 22, art. 5, of the constitution, provides in part: "Justices of the peace shall have such jurisdiction as may be conferred by law, but they shall not have jurisdiction of any cause wherein the value of property or the amount in controversy exceeds the sum

COURTS (Continued).

of three hundred dollars, exclusive of interest, nor where the boundaries or title to any real property shall be called in question." (Fox v. Flynn, 580.)

5. Sec. 8, art. 1, of the constitution, provides that "No person shall be held to answer for any felony or criminal offense of any grade, unless on presentment or indictment of a grand jury or on information of the public prosecutor, after a commitment by a magistrate, except in cases of impeachment, in cases cognizable by probate courts or by justices of the peace, and in cases arising in the militia when in actual service in time of war or public danger." (Fox v. Flynn, 580.)

6. Sec. 20, art. 5, enlarged the jurisdiction of the district courts so as to include cases cognizable by the inferior courts in addition to cases which, prior to the adoption of the constitution, were prosecuted by indictment only. (Fox v. Flynn, 580.)

7. Sec. 8, art. 1, of the constitution, places a limitation upon the power of the legislature to confer criminal jurisdiction on probate and justices' courts. (Case of *State v. Raaf*, 16 Ida. 411, 101 Pac. 747, cited and modified.) (Fox v. Flynn, 580.)

8. In construing sec. 8, art. 1, in the light of the system of courts existing prior to, and at the time of, the adoption of our constitution, it was obviously intended to limit the jurisdiction of the probate and justices' courts in criminal and civil cases, giving to them jurisdiction over such misdemeanor cases as were triable in such courts under the statutes of the territory as they existed prior to the adoption of the constitution. It was also intended to provide that probate judges and justices of the peace act as committing magistrates, before whom any person charged with a felony may have, or waive, a preliminary examination. (Fox v. Flynn, 580.)

9. When jurisdiction was conferred upon the district courts by the constitution in all cases, both at law and in equity, there was conferred, as an incident to such grant, the power to make the same effective by any suitable process or mode of procedure, and district courts may avail themselves of the method of procedure prescribed by the statutes for inferior courts, or as provided by sec. 3925, Rev. Codes. (Fox v. Flynn, 580.)

10. Where a district court, in a proper case, assumes jurisdiction of a misdemeanor, cognizable before a probate or justices' court, and files a complaint and issues a warrant it is the duty of said court to proceed with the trial of the cause; and a writ of mandate will issue from this court compelling such court to so proceed. (Fox v. Flynn, 580.)

COURTS (Continued).***Jurisdiction—Amount in Controversy—Joinder of Causes and Parties.***

11. Where a state, as a trustee of an express trust, sues to recover sums which, in the aggregate, exceed \$3,000, exclusive of interest and costs, for and on behalf of certain depositors in a bank whose deposits have been lost as a result of the failure of the bank commissioner to perform his official duty and where the claim of no individual depositor amounts to \$3,000, although diversity of citizenship exists between the parties to the action, a petition for removal to the federal court was properly denied. (*State v. Title Guaranty and Surety Co.*, 752.)

12. In such case the state was plaintiff for the use and benefit of the depositors, and properly united the several causes of action stated in the complaint, since they arose out of contracts, and the causes of action so united affect all parties to the suit and did not require different places of trial. The demurrer to the complaint upon the ground of misjoinder of parties plaintiff and misjoinder of causes of action was properly overruled. (*State v. Title Guaranty and Surety Co.*, 752.)

See Appeal and Error, 21, 22; Indian Reservation, 3; Judges.

COVENANTS.

See Deeds.

CRIMINAL LAW.***Appointment of Special Prosecutor.***

1. Under the provisions of sec. 2081, Rev. Codes, when the prosecuting attorney is disqualified as provided by said section, the district court is given authority to appoint a person to prosecute any criminal case pending in the district court, and the person so appointed is required to prosecute such case. (*Adamson v. Board of County Commissioners*, 190.)

2. The law provides for a prosecuting attorney in each county, and it is made his duty to prosecute all criminal cases except such as he is disqualified under the law to prosecute. (*Adamson v. Board of County Commissioners*, 190.)

3. County commissioners are not authorized under the law to employ counsel to assist the prosecuting attorney in prosecuting criminal cases. (*Adamson v. Board of County Commissioners*, 190.)

4. *Held*, under the facts of this case that the respondent was a suitable person to be appointed by the district court to prosecute the criminal case referred to in the record. (*Adamson v. Board of County Commissioners*, 190.)

CRIMINAL LAW (Continued).*Witnesses and Evidence.*

5. Where a motion is made to strike out the entire answer of a witness where a part of such answer is responsive to the question and a part is not, it is not error for the court to deny such motion. (State v. Clark, 48.)

6. Where a witness for the defendant testifies that he was in the room of the prosecutrix on the evening or night the alleged crime was committed, and the prosecuting attorney states in open court and before the jury that the witness, according to his own testimony, had committed an offense under the laws of the state, and demands that he be remanded to the custody of the sheriff to be prosecuted for such offense, and the court thereupon orders the arrest of the witness, and he is arrested in the presence of the jury and taken from the courtroom and placed in the jail, such proceeding is prejudicial error and an invasion of the rights of the defendant, and an intimation of the opinion upon the part of the court that the witness had committed either perjury or some other felony. Such action was prejudicial to the rights of the defendant. (State v. Clark, 48.)

7. An instruction given by the court to the effect that the jury must not be influenced in any way by the action of the court in ordering the arrest of the witness in the presence of the jury and must not be influenced by the remarks of the court or counsel touching the arrest of said witness, did not, and could not, cure the error of the conduct of counsel or the action of the court in said matter. (State v. Clark, 48.)

8. Held, that the action of the assistant prosecuting attorney and the arrest of the witness in the presence of the jury was reversible error. (State v. Clark, 48.)

9. It was error for the court to reject any of the testimony given by the prosecutrix on the preliminary examination which would tend to impeach or contradict the testimony she gave on the trial of the case. (State v. Clark, 48.)

10. Where the record discloses no prejudice, motive, feeling of ill-will or revenge on the part of the complaining witness against the defendant, and where it does not appear that the complaining witness was specially employed to make up evidence against the defendant, it is not error for the court to refuse to give an instruction to the jury that "Greater care should be exercised in weighing the testimony of informers, detectives and other persons specially employed to make up evidence against the defendant, than in the case of witnesses who are wholly disinterested." (State v. Bouchard, 500.)

CRIMINAL LAW (Continued).

11. The credibility of the witnesses, as well as the weight to be given to their testimony, is exclusively for the jury, and it would be error for the court to indicate the degree of credibility or the weight that should be given to the testimony of any witness. (*State v. Bouchard*, 500.)

12. It is within the province of the court to say whether or not the evidence is competent or admissible, but its weight, credibility and sufficiency are primarily for the jury. There is no more justification for the court to assume the functions of the jury than for the jury to assume the duties of the court. Sec. 4824, Rev. Codes, provides: "Upon an appeal from a judgment, the court may review the verdict or decision and any intermediate order or decision, if excepted to, which involves the merits or necessarily affects the judgment, except a decision or order from which an appeal might have been taken: Provided, that whenever there is substantial evidence to support a verdict the same shall not be set aside." (*State v. Bouchard*, 500.)

Testimony of Accomplice.

13. Under the provisions of sec. 7871, Rev. Codes, a conviction cannot be had upon the testimony of an accomplice unless he is corroborated by other evidence. (*State v. Clark*, 48.)

Testimony of Prosecutrix.

14. Where the testimony of the prosecutrix is contradictory of her reputation for truthfulness and veracity is impeached, and the defendant testifies and denies specifically the testimony of the prosecutrix, and his testimony is corroborated by other witnesses, the testimony of the prosecutrix without corroboration will not warrant a conviction. (*State v. Clark*, 48.)

Instructions.

15. *Held*, that the court erred in giving certain instructions. (*State v. Clark*, 48.)

New Trial.

16. *Held*, that the court erred in not granting defendant's motion for a new trial. (*State v. Clark*, 48.)

See Constitutional Law, 10; Counties, 7; Jury; Witnesses.

CROSS-EXAMINATION.

See Witnesses, 1-4.

DAMAGES.***From Escape of Water from Irrigation System—Joint Liability.***

1. Where damages to real and personal property are sought to be recovered from two defendants and it is alleged in the complaint

DAMAGES (Continued).

that such damages were caused by the wrongful and wilful acts of the defendants, in the joint operation and management of a canal system and reservoir, and the evidence shows that one of the defendants is the owner and has operated, managed and controlled such canal and reservoir, and that the other defendant had no title or interest therein, and that such defendant did not manage or control or join in the management and control of such system, and judgment is entered on such evidence against both defendants jointly, the judgment will be set aside and a new trial granted. (Verheyen v. Dewey, 1.)

2. *Held*, under the evidence that the water was drawn out of Lake Ethel reservoir under the direction of the general manager of the irrigation district, not maliciously, but for the purpose of protecting said irrigation works and the inhabitants of Mason creek basin. (Verheyen v. Dewey, 1.)

3. The defendants are charged as joint tort-feasors, and where two or more parties act each for himself and independently of each other in a matter that results injuriously to another, they cannot be held jointly liable for the acts of each other. (Verheyen v. Dewey, 1.)

4. An action at law for damages cannot be maintained against several defendants jointly when each acted independently of the other and there was no concert or unity of design between them; and the tort does not become joint because afterward its consequences united with the consequences of several other torts committed by other persons. (Verheyen v. Dewey, 1.)

5. *Held*, that if the defendant Dewey, acting for himself, opened up the gates of Lake Ethel reservoir and injured the personal property of the plaintiff, the defendant irrigation district is not liable for such unlawful acts of Dewey; and further *held* that Dewey, having no interest whatever in said irrigation district, could not be held personally liable for the damages done on account of seepage from said system. (Verheyen v. Dewey, 1.)

6. *Held*, under the evidence in this case that neither of the defendants could be held liable for damages resulting from natural floods flowing down said Mason creek valley. (Verheyen v. Dewey, 1.)

7. *Held*, that the giving of instructions Nos. 3, 4 and 9 was reversible error. (Verheyen v. Dewey, 1.)

8. *Held*, that the denial of defendant Dewey's motion for a nonsuit was error. (Verheyen v. Dewey, 1.)

From Flooding Land Through Construction of Dam.

9. Where it was alleged that the plaintiff had been damaged by reason of the construction of certain dams in the Spokane river,

DAMAGES (Continued).

and it was alleged that the plaintiff's lands were flooded by reason of said dams having raised the water level of Lake Coeur d'Alene and the creek on which his land was located, it was necessary for him to prove that such dams had raised the water level and caused the injury to his land. (Hall v. Washington Water Power Co., 437.)

10. *Held*, that the evidence was not sufficient to prove that the plaintiff's land was injured by reason of the maintenance of said dams. (Hall v. Washington Water Power Co., 437.)

11. Where the evidence is not sufficient to support a verdict for the plaintiff, the trial court does not err in granting a motion for a nonsuit and entering judgment of dismissal. (Hall v. Washington Water Power Co., 437.)

For Personal Injuries.

12. The right to recover damages for personal injuries sustained by a fall caused by a defective sidewalk is based upon the principle that the person injured should receive full compensation for the loss sustained with the least possible burden to the party responsible for the injury. (Beaton v. City of St. Maries, 638.)

13. Although the amount of recovery is largely within the discretion of the jury, the verdict must be based upon the evidence, and when it is apparent therefrom that the recovery is in excess of the actual loss sustained, the judgment must be modified or vacated. (Beaton v. City of St. Maries, 638.)

14. In an action for damages for personal injury the complaint must state all facts necessary to inform the defendant of all acts or omissions relied upon for a recovery, but only ultimate facts need be pleaded. (Graham v. Coeur d'Alene & St. Joe Transportation Co., 454.)

15. Although no damage is claimed because of loss of employment, evidence showing that plaintiff suffered inconvenience and pain after the accident in attempting to perform his work is competent as tending to show the extent of his physical injury and suffering. (Graham v. Coeur d'Alene & St. Joe Transportation Co., 454.)

16. Physical pain suffered by the plaintiff as a direct result of the accident is a proper element of damage, although the evidence fails to show that he sustained financial loss by reason of his injury. (Graham v. Coeur d'Alene & St. Joe Transportation Co., 454.)

17. *Held*, that the evidence is sufficient to support the verdict, and that the court did not err in overruling appellant's motion for a nonsuit. (Lorang v. Randall, 259.)

18. *Held*, that the instructions given by the court fairly cover the case, and were applicable to the evidence. (Lorang v. Randall, 259.)

DEEDS.***Escrow—Covenants of Warranty—Estoppel.***

1. Where M. executes a deed conveying certain town lots to B. and said deed is placed in escrow to be delivered to B. upon the payment of the purchase price as agreed, and thereafter B. has certain improvements placed on said lots, and then sells said lots to U., and U. has full knowledge of said transactions and is advised by M. and others that said improvements have not been paid for and that liens may be filed against said lots, and U. takes the advice of his attorney that the time for filing liens had passed, and purchases said lots from B. and pays to M. the balance due from B. on the purchase price of said lots, and pays to B. the balance of the purchase price which he had agreed to pay to B. for said lots, and in order to save the expense of recording two deeds, it is arranged that the escrow deed should be destroyed and that M. should convey said lots direct to U., which he did, *held*, under the facts that although M. conveyed to U. by grant, bargain and sale deed, he did not warrant the title to said lots against liens thereafter filed for the construction of said improvements. (*Urich v. McPherson*, 319.)

2. *Held*, under the facts of this case that U. is estopped from claiming that M. warranted the title to said lots as against said liens. (*Urich v. McPherson*, 319.)

See Boundaries.

DEFAULTS.

See Judgments, 7-14.

DEFINITIONS.

See Words and Phrases.

DISMISSAL.

See Appeal and Error, 23.

DISTRICT ATTORNEY.

See Criminal Law.

DISTRICT COURT.

See Appeal and Error, 21, 22; Courts.

DITCHES.

See Damages; Eminent Domain; Irrigation; Municipal Corporations; Nuisance.

DIVORCE.

In General.

1. Where a decree of divorce is granted on the ground of adultery, the evidence ought to be clear and conclusive of that offense. (Brown v. Brown, 205.)
2. The evidence *held* not sufficient to support the findings of the trial court. (Brown v. Brown, 205.)

EJECTMENT.

Evidence.

1. *Held*, that it was not error for the court to admit in evidence Exhibit No. 2, which was a plat of the land in question prepared by surveyor Trask showing a description of the land in question. (Papesh v. Weber, 557.)
2. The evidence *held* sufficient to support the finding of facts, and *held* that the court applied the correct rule of law to such facts in entering judgment in favor of the defendants. (Papesh v. Weber, 557.)

EMINENT DOMAIN.

Condemnation Proceedings.

1. Sec. 5226, Rev. Codes, being part of the title on eminent domain, provides for the appointment by the district court, upon ten days' notice, of commissioners to assess damages sustained by reason of the condemnation of the property described in the complaint, but does not provide what such notice shall contain, or in what way proof of service of notice may be made. Sec. 5228, Rev. Codes, of the same title, provides: "Except as otherwise provided in this title, the provisions of this code relative to civil actions and new trials and appeals, are applicable to, and constitute, the rules of practice in the proceedings in this title." (Empire Mill v. District Court of Eighth Judicial District, 383.)

2. Where it appears from the record that the defendants in condemnation proceedings were not within the jurisdiction of the district court at the time notice for the appointment of commissioners to assess damages was sought to be served upon them under sec. 5226, Rev. Codes, and that service by mail was made upon them as provided by sec. 4890, Rev. Codes, such service was valid under the provision of sec. 5228, Rev. Codes, and the proof thereof may be established by competent evidence. (Empire Mill Co. v. District Court of Eighth Judicial District, 383.)

3. A technical construction should not be placed upon the procedure adopted in making service of notice for the appointment of commissioners under the eminent domain statute, as long as the proof establishes the fact that the service of such notice was actually

EMINENT DOMAIN (Continued).

made; and when so made, the court has jurisdiction to make the appointment. (*Empire Mill Co. v. District Court of Eighth Judicial District*, 383.)

4. Where service of notice for the appointment of commissioners, under the eminent domain statute, is made on March 31, 1915, fixing the date of hearing for the appointment of said commissioners on April 10, 1915, the ten days' notice required by the statute is given, the time being correctly computed under sec. 11, Rev. Codes. (*Empire Mill Co. v. District Court of Eighth Judicial District*, 383.)

5. In a notice of hearing on application for the appointment of commissioners in condemnation proceedings, the following description of land sought to be condemned, "Said land sought to be appropriated being a strip of land 50 feet in width over, upon and across the south half of the northwest quarter and the northwest quarter of southwest quarter of section 3, township 43 north of range 1, W. B. M., in Kootenai county, Idaho," is sufficient to identify the land sought to be condemned, when, in the same notice, reference is made, as a part thereof, to the complaint filed in the action, for a more complete description of the property; it being only required in such notice to apprise the owner how much of his land is to be condemned, what portion thereof and for what purpose, and it appearing from reference to the complaint that a competent surveyor could readily locate the land sought to be condemned. (*Empire Mill Co. v. District Court of Eighth Judicial District*, 383.)

6. In a proceeding of this nature the court will apply the rule prescribed in sec. 4231, Rev. Codes, viz., "The court must, in every stage of an action, disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the parties and no judgment shall be reversed or affected by reason of such error or defect." (*Empire Mill Co. v. District Court of Eighth Judicial District*, 383.)

7. Under the provisions of sec. 3862, Rev. Codes, the court has control of its process, and may order a defective summons so amended as to conform to the requirements of the statute, and after amendment may order it withdrawn from the files and served. (*Ridenbaugh v. Sandlin*, 14 Ida. 472, 125 Am. St. 175, 94 Pac. 827, cited and followed.) (*Empire Mill Co. v. District Court of Eighth Judicial District*, 383.)

Right of Way for Ditches, Canals and Reservoirs.

8. Under the provisions of an act approved March 18, 1901, (Sess. Laws 1901, p. 191), a person or persons desiring to construct a ditch, canal, reservoir or other works for carrying or distributing public water for any beneficial use over or upon lands owned or controlled by the state are granted the right of way for

EMINENT DOMAIN (Continued).

the same upon a compliance with the provisions of said act. (Idaho-Iowa Lateral & Reservoir Co. v. Fisher, 695.)

9. Sec. 8, art. 9, of the state constitution provides that no school lands shall be sold for less than \$10 an acre, which lands must be sold at public auction. Said provisions contemplate that the fee-simple title shall be sold for not less than \$10 per acre and must be sold at public auction. (Idaho-Iowa Lateral & Reservoir Co. v. Fisher, 695.)

10. Under the provisions of sec. 14, art. 1 of the state constitution, the necessary use of lands for the construction of reservoirs or storage basins for the purpose of irrigation is declared to be a public use and subject to the regulation and control of the state. (Idaho-Iowa Lateral & Reservoir Co. v. Fisher, 695.)

11. The granting by the state of an easement for a reservoir on school lands under the provisions of said sec. 14, art 1, is not such a sale or disposal of the land as is contemplated by the Admission Act admitting Idaho into the Union of states, nor as contemplated by sec. 8 of art. 9 of the state constitution, and does not convey the legal title to the land; but leaves the fee-simple title in the state. (Idaho-Iowa Lateral & Reservoir Co. v. Fisher, 695.)

12. Under the classification of estates and rights in hands subject to be taken for public use as provided by sec. 5211, Rev. Codes, the fee-simple title may be taken for reservoirs and dams and for permanent flooding occasioned thereby. By that classification it was not intended to compel the condemnor to take the title in fee simple, but was intended that the compensation for the land should not be reduced simply because an easement was taken or given rather than a fee-simple title. (Idaho-Iowa Lateral & Reservoir Co. v. Fisher, 695.)

13. Under the provisions of said sec. 14 of the constitution it was not intended that, by the subjection of state lands to certain public uses, the title in fee should pass to the condemnor under the eminent domain statutes. (Idaho-Iowa Lateral & Reservoir Co. v. Fisher, 695.)

14. When Idaho became a state it had and assumed the power of eminent domain as one of the inalienable rights of its sovereignty, and Congress, when it admitted Idaho into the Union and provided that all school lands granted to the state should not be sold for less than \$10 per acre, did not intend to deprive the state of the power of eminent domain. And the state may exercise such right over all state lands, and may grant, in such manner as the legislature may provide, easements for all of the public uses mentioned in said sec. 14, art. 1, of the state constitution. (Idaho-Iowa Lateral & Reservoir Co. v. Fisher, 695.)

EMINENT DOMAIN (Continued).

15. The necessary use of lands for the construction of reservoirs over state lands is subject to the regulation and control of the state. (Idaho-Iowa Lateral & Reservoir Co. v. Fisher, 695.)

EMPLOYERS' LIABILITY.

See Master and Servant.

ENGINEER.

See Contracts, 2, 3.

ESCROW.

See Deeds.

EVIDENCE.***Judicial Notice.***

The court will take judicial notice of the meaning of abbreviations in common use describing legal subdivisions of land by meridian, township and range. (Empire Mill Co. v. District Court of Eighth Judicial District, 383.)

See Criminal Law; Ejectment.

FIRE INSURANCE.

See Insurance.

FLOODING OF LAND.

See Damages, 1-10.

FRAUDS, STATUTE OF.

See Pleading, 2, 3.

FRIVOLOUS APPEAL.

See Appeal and Error, 24.

GRAND LARCENY.

See Larceny.

GRAZING.

See Constitutional Law, 4, 10.

HERDING OF SHEEP.

See Constitutional Law, 4-10.

HIGHWAYS.

Construction and Improvement—Tax Levy.

1. *Held*, under sec. 4108, Rev. Codes, that Weiser Valley Highway District is entitled to be substituted for, and in lieu of, Good Road District No. 2. (Good Road District No. 2 v. Washington County, 732.)

2. The purpose of the enactment of sections 1049 to 1060, inclusive, Rev. Codes, and the amendments thereto (secs. 1056 and 1058 amended, Sess. Laws, 1909, pp. 172, 173, sec. 1054 amended, Sess. Laws, 1911, p. 188, and sec. 1056 amended, Sess. Laws, 1915, p. 48), was to create good road districts and provide for the raising of money by tax levies for the construction and improvement of highways within such districts. (Good Road District No. 2 v. Washington County, 732.)

3. "Highways," as defined by sec. 874, Rev. Codes, "are roads, streets or alleys, and bridges, laid out or erected by the public, or if laid out or erected by others, dedicated or abandoned to the public." (Good Road District No. 2 v. Washington County, 732.)

4. Sec. 1056, Rev. Codes, as amended, Sess. Laws, 1909, pp. 172, 173, provides *inter alia* that "the county auditor shall set apart seventy-five per cent (75%) of the general tax levy raised for road purposes in the district to the credit of such district, which shall constitute a fund for the improvement of the roads in such district." *Held*, that it was the intention of the legislature to include the tax levy for bridge as well as for road purposes, and that it is the duty of the county auditor to set apart 75 per cent of the general tax levy raised in a good road district for both road and bridge purposes to the credit of such district for the improvement of its roads and bridges. (Good Road District No. 2 v. Washington County, 732.)

HOMICIDE.

Indictment for Involuntary Manslaughter.

Where it clearly appears from the facts set forth in the information that the defendant is charged with the crime of involuntary manslaughter, and the acts or elements which constitute the offense of involuntary manslaughter are sufficiently charged to enable a person of common understanding to know what is intended, the information is sufficient, even though it fails to allege that the defendant is charged with the crime of involuntary manslaughter, and makes the general charge of manslaughter. The facts alleged, rather than the designation of the offense, control. (State v. Mickey, 626.)

See Indian Reservation, 2.

HORTICULTURAL INSPECTORS.

Appointment.

1. Sec. 1310, Rev. Codes, as amended by the Session Laws of 1911, page 152, providing for the appointment of a state board of horticultural inspectors, does not vest the power of appointment in the State Horticultural Association. (Ingard v. Barker, 124.)

2. It is beyond the authority of this court to make judicial amendments to sec. 1310, Rev. Codes, as amended by chapter 58, Sess. Laws 1911, by adding words thereto, in order to place a legal obligation upon the Governor to appoint members of the state board of horticultural inspectors recommended by the horticultural association, although the court may be of the opinion that a moral obligation rested upon the Governor to act concurrently with the State Horticultural Association in the selection of said members. (Ingard v. Barker, 124.)

3. Where the power of appointment is clearly provided for in the act to be in the executive, and the only limitation attempted to be placed upon the power of the Governor to appoint is that, in making said appointments, he shall consider any recommendations made by the State Horticultural Association as the proper persons to be so appointed, and where the statute fails to fix the number of persons that shall be recommended, the time or place when the recommendations shall be made, the qualifications of the persons so recommended, and to provide that the Governor shall appoint said board from those so recommended, there is no legal obligation resting upon the Governor to appoint said board from the persons so recommended. (Ingard v. Barker, 124.)

4. Sec. 1310, Rev. Codes, as amended, *supra*, requires the Governor of the state to consider any recommendations for appointment as members of the state board of horticultural inspectors made by the State Horticultural Association, and it is incumbent upon the Governor to carefully consider the person or persons so recommended before appointing the members of the state board of horticultural inspectors, that by the joint act of the association and the Governor, the purpose and intention of the legislature might be carried out, viz., that the board be constituted of members who are learned in the science of horticulture, to the end that the horticultural interests of the state be properly protected and expanded. (Ingard v. Barker, 124.)

5. Sec. 1310, Rev. Codes, as amended, *supra*, vests in the Governor discretionary power in appointing the members of the state board of horticultural inspectors, which he may do from the list of names recommended by the state horticultural association, but he is not confined, in making said appointments, to the names so recommended. (Ingard v. Barker, 124.)

HORTICULTURAL INSPECTORS (Continued).

6. *Held*, that the state horticultural association has not had a reasonable time within which to submit recommendations to the Governor of proper persons to be appointed members of the state board of horticultural inspectors, and under the facts in this case, the State Horticultural Association is allowed sixty days from and after the handing down of this opinion in which to make such recommendations, at the expiration of which time the Secretary of State shall issue commission to any person or persons so appointed. (*Ingard v. Barker*, 124.)

HOTEL.

See Intoxicating Liquors, 8-12.

HUSBAND AND WIFE.

See Larceny, 4-7.

IMPEACHMENT.

See Witnesses, 1-4.

INDIAN RESERVATION.***Railroad Right of Way.***

1. At a time prior to the date of the treaty between the United States and the Nez Perce Indians wherein it was agreed that the United States would, for a period of 25 years, prohibit the introduction of intoxicating liquors into the country then embraced within the boundaries of the Nez Perce Indian reservation, the government, by act of Congress, granted a railway right of way through said reservation, and it was provided in said act that the compensation to be paid to the Indians for said right of way should be fixed by the Secretary of the Interior, agreed to by the Indians, and paid before any right under said act should accrue to the railway company. *Held*, that the Indian title to the land embraced within the right of way was extinguished prior to the date of the treaty and that the land included therein was not "Indian country." (*State v. Tilden*, 262.)

Jurisdiction of Homicide.

2. The appellant, a Nez Perce Indian policeman, pursuant to instruction from his superior officer, went upon said right of way at a point where it crosses the former Nez Perce Indian reservation, in order to search other Nez Perce Indians suspected of having intoxicating liquors in their possession, and while there, in an encounter with one of said Indians, shot and killed him. *Held*, that the state courts, and not the federal courts, have jurisdiction to try appellant for such homicide. (*State v. Tilden*, 262.)

INDICTMENT OR INFORMATION.

See Crime in Question.

INJUNCTION.

See Intoxicating Liquors, 8-12.

INSTRUCTIONS.

See Criminal Law, 13; Trial, 2.

INSURANCE.*Fire Insurance.*

1. When the insured had employed two competent watchmen and, in good faith, instructed them to carefully watch the property and to guard against fire, both by day and by night, the condition of the "watchman clause" in the policy was fully complied with on the part of the insured. (*Theriault v. California Insurance Co., 476.*)

2. Regardless of the clause in a policy that no officer, agent or other representative of the insurance company shall have the power to waive any of its provisions or conditions, where other proofs than those required in the policy are accepted by an agent, authorized to adjust a loss, the company will be deemed to have waived the provisions of the policy fixing the manner of making proof of loss. (*Theriault v. California Insurance Co., 476.*)

INTEREST.

See Principal and Surety, 1.

INTOXICATING LIQUORS.*Prohibition District.*

1. Chapter 11, Session Laws 1915, providing, among other things, that it shall be unlawful for any person, firm, company or corporation, its officers or agents, to sell, manufacture or dispose of any intoxicating liquor or alcohol of any kind within a prohibition district, or to have in his or its possession, or to transport, any intoxicating liquor or alcohol within a prohibition district, unless the same shall have been procured and is so possessed and transported under a permit as in said act provided, is not in contravention of section 1 of the fourteenth amendment to the constitution of the United States, nor of section 13, article 1 of the constitution of Idaho. It was passed by the legislature with a view to the protection of the public health, public morals and public safety, and has a real and substantial relation to those objects; and is, therefore, a reasonable exercise of the police power of the state. (*In re Crane, 671.*)

INTOXICATING LIQUORS (Continued).

2. The object of the title of an act is to give a general statement of the subject matter, and such a general statement will be sufficient to include all provisions of the act having a reasonable connection with the subject matter mentioned and a reasonable tendency to accomplish its purpose. It is sufficient if the act treats of but one general subject and that subject is expressed in the title. (In re Crane, 671.)

3. *Held*, that chapter 11, Session Laws 1915, is not in conflict with article 3, section 16 of the constitution, and is not, therefore, unconstitutional or void. (In re Crane, 671.)

4. Said chapter is of general application to every county in the state alike; and with the electors of the respective counties or their boards of county commissioners, or municipal authorities of any incorporated city or village, is left the decision to accept or reject its terms and conditions. It is, therefore, neither a local nor a special act, but a general law, and not in conflict with section 19, article 3 of the constitution. (In re Crane, 671.)

5. The chapter expressly provides for the purchase and possession of pure alcohol to be used for scientific purposes. *Held*, that the practice of medicine, surgery, dentistry and dental surgery are sciences, and that pure alcohol may be lawfully procured under the terms of the law in question in the manner provided therein for use in the practice of these professions or for any other scientific purposes. (In re Crane, 671.)

6. A prohibition district within the meaning of chapter 11, Session Laws 1915, is any county or incorporated city or village wherein the manufacture, sale, possession, keeping for sale, transportation for sale or gift of intoxicating liquors for beverage purposes is declared unlawful, whether such prohibition district be established by constitutional amendment, legislative enactment, adoption of the provisions of the local option law, or by refusal of municipal authorities or county commissioners to grant saloon licenses. (In re Crane, 671.)

7. *Held*, that the provisions of the chapter are effective in all such prohibition districts within the state, whether created before or after its adoption. (In re Crane, 671.)

Injunction Against Operation of Hotel.

8. An act approved February 18, 1911 (Sess. Laws, p. 30), is an act supplementing and providing additional means for the enforcement of the provisions of certain acts intended to regulate, restrain, control and prohibit the sale of intoxicating liquors, and provides, among other things, that all places in a prohibition district where intoxicating liquors are sold, furnished, delivered, given away or otherwise disposed of in violation of law, etc., are common

INTOXICATING LIQUORS (Continued).

nuisances; and also provides that the prosecuting attorney of any county where such nuisances exist may maintain an action in the district court, in the name of the state, to abate and perpetually enjoin the same, and that an injunction can be granted at the commencement of an action and no bond shall be required. (State v. Kasiska, 548.)

9. Under the provisions of said act the prosecuting attorney brought this action and the judge of the fifth judicial district in and for the county of Bannock issued a writ of injunction by which the defendant was enjoined from keeping open or permitting to be kept open the Bannock Hotel, the building in which it was alleged illegal sales of intoxicating liquors were made, and also enjoined the defendant from selling, delivering or otherwise disposing of intoxicating liquors in and about said premises. (State v. Kasiska, 548.)

10. *Held*, under said act and the allegations of the complaint that the judge did not err in granting said injunction. (State v. Kasiska, 548.)

11. *Held*, that the injunction issued was a temporary one and was only intended to continue until the final hearing of the case unless sooner modified by the court or judge. (State v. Kasiska, 548.)

12. *Held*, under the facts in this case that the court did not err in denying the motion to dissolve or modify said injunction. (State v. Kasiska, 548.)

IRRIGATION.***Water Rights and Contracts.***

1. The facts in this case considered and held to not support the contention that appellant and respondent are co-owners of the irrigation system; that appellant's ownership of said system is established by the evidence, and that respondent is the owner of a right to two cubic feet of water per second of time to be delivered through the ditches and canals thereof. (Nampa & Meridian Irr. Dist. v. Briggs, 84.)

2. The deeds executed by the predecessors of appellant and respondent examined, and it is found that the agreement to pay the sum of \$12 per annum on the water right described in each of said deeds as an assessment for the management and maintenance of said irrigation system is a part of the consideration upon which said deeds are based. (Nampa & Meridian Irr. Dist. v. Briggs, 84.)

3. Appellant became the owner of the irrigation system in question after contracts had been entered into whereby respondent's predecessor and his successors in interest were to enjoy the use of

IRRIGATION (Continued).

two cubic feet of water per second of time and were to pay \$24 per year toward the upkeep of the irrigation system. It was optional with the appellant to make the purchase or not. Having elected to purchase, it could acquire no greater interest than its vendor had and must take its title burdened with said contracts. Having purchased the system it might have acquired respondent's property right by purchase or condemnation and might have brought him into the district upon equal terms with its members, but it did not do so, and his interest granted by these contracts is property that may not be confiscated, or taken, without payment of just compensation. (*Nampa & Meridian Irr. Dist. v. Briggs*, 84.)

4. The water right contracts entered into between the predecessors in interest of the appellant and respondent were so entered into before the adoption of the constitution of Idaho. There was nothing in the law of the territory of Idaho prohibiting such contracts, and sec. 10, art. 1 of the federal constitution prohibits states from passing laws impairing the obligation of contracts. (*Nampa & Meridian Irr. Dist. v. Briggs*, 84.)

5. The appellant, an irrigation district created under the laws of the state of Idaho, is not a public service corporation in the sense that it is a common carrier, to any other or greater extent than the term implies when applied to its own membership, and when confined to the business of carrying water for the irrigation of lands within its own district. It is a mutual, co-operative corporation, organized not for profit, engaged in distributing water to its members for use upon lands within its district. (*Nampa & Meridian Irr. Dist. v. Briggs*, 84.)

6. The fact that such a corporation as appellant is may exercise the power of eminent domain does not, of necessity, constitute it a public service corporation in the sense that the public may exact any service from it. (*Nampa & Meridian Irr. Dist. v. Briggs*, 84.)

7. It appears from the evidence and the stipulation of the parties that in deeds by which title to the irrigation system was granted to certain of appellant's predecessors in interest and through whom it deraigned title, there were reserved certain water rights, and that among said rights so reserved were those now claimed by respondent; also that at the time appellant purchased, and for a long time prior thereto, respondent was in possession of his land and was using water thereon from the canal pursuant to the stipulation in his deeds. *Held*, that these are facts, knowledge of which ought to put a prudent man on inquiry, which would have readily disclosed the true condition of respondent's claim, whether his deeds were so acknowledged as to entitle them to go of record or not. (*Nampa & Meridian Irr. Dist. v. Briggs*, 84.)

IRRIGATION (Continued).

8. The respondent, before the commencement of the action, tendered to the appellant and deposited in court \$120, in which sum he is indebted to appellant; the appellant is entitled to judgment against the respondent in said amount, and the respondent is entitled to judgment against the appellant, under sec. 4909, Rev. Codes, for the amount of his costs incurred in the district court. (*Nampa & Meridian Irr. Dist. v. Briggs*, 84.)

Carey Act Lands.

9. Under a Carey Act project where a construction company has entered into a contract with the state to initiate the appropriation of water and to construct canals, ditches and reservoirs for the irrigation of the land within the project, and has also the right to contract with settlers upon such lands to sell them water rights, and does contract with the settler or entryman to sell him a water right for his land, and the settler agrees to pay for such water right in annual instalments, and thereafter when his land becomes subject to taxation his land is taxed and he fails to pay the taxes, and the land is sold at tax sale and a tax deed is thereafter issued conveying the land to the purchaser or his assignee, such tax deed does not convey the water right purchased by the entryman of such land for the irrigation thereof. (*Bennett v. Twin Falls North Side Land & Water Co.*, 643.)

10. Under the provisions of sec. 1629, Rev. Codes, the water rights referred to therein do not attach and become such an appurtenance to the land that the title to such water right is conveyed under a tax deed which conveys the title to the land where the purchase price of the water right has not been paid. (*Bennett v. Twin Falls North Side Land & Water Co.*, 643.)

11. Under the provisions of sec. 3240, Rev. Codes, all of the waters of the state when flowing in their natural channels, including the waters of all natural springs and lakes within the boundaries of the state, are declared to be the property of the state. (*Bennett v. Twin Falls North Side Land & Water Co.*, 643.)

12. Under the provisions of secs. 4 and 5, art. 15, of the state constitution, the state has power and authority to direct and control the appropriation of the unappropriated waters of the state, and, when the requirements of the statute are complied with, the right gained by the appropriator is a right to the use of the water. (*Bennett v. Twin Falls North Side Land & Water Co.*, 643.)

13. Under the provisions of sec. 3056, Rev. Codes, water rights are declared to be real property or real estate. (*Bennett v. Twin Falls North Side Land & Water Co.*, 643.)

14. When one has legally acquired a water right, he has a property right therein that cannot be taken from him for public or

IRRIGATION (Continued).

private use except by due process of law and until a just compensation shall be paid therefor. (*Bennett v. Twin Falls North Side Land & Water Co.*, 643.)

15. A water right is an independent right and is not servitude upon some other thing, and is an incorporeal hereditament, being neither tangible nor visible. (*Bennett v. Twin Falls North Side Land & Water Co.*, 643.)

16. The owner of a water right, by purchase or original appropriation, may sell the water right separate and apart from his land. (*Bennett v. Twin Falls North Side Land & Water Co.*, 643.)

17. The provisions of sec. 1644, Rev. Codes, as amended by the Laws of 1913, p. 242, exempt from taxation such a water right as the one involved in this case. (*Bennett v. Twin Falls North Side Land & Water Co.*, 643.)

18. *Held*, under the settlers' contract that the title to the water right does not vest in the entryman until he makes full payment for the same. (*Bennett v. Twin Falls North Side Land & Water Co.*, 643.)

19. The provisions of sec. 1629, Rev. Codes, do not make the water right an inseparable appurtenance to the land, or such an appurtenance that a tax deed transferring the title to the land would also transfer the unpaid for water right. (*Bennett v. Twin Falls North Side Land & Water Co.*, 643.)

20. *Held*, that the purchaser of a tract of Carey Act land at tax sale may be subrogated to all of the rights of the entryman so far as the water right is concerned, and may procure title thereto by making the payments provided for by the water contract and in accordance with its terms. (*Bennett v. Twin Falls North Side Land & Water Co.*, 643.)

21. Upon authority of *State v. Twin Falls Canal Co., a Corporation*, 21 Ida. 410, 121 Pac. 1039, *held*, that purchasers of school lands within the reclamation project of said canal company are entitled to purchase and have issued to them shares of water right stock in said corporation, and that the peremptory writ of mandate issue. (*State v. Twin Falls Canal Co.*, 728.)

See Contracts; Damages, 1-10; Eminent Domain, 8-15; Public Utilities Commission; Waters and Watercourses.

JOINDER OF CAUSES AND PARTIES.

See Courts, 12.

JOINT LIABILITY.

See Damages, 3, 4.

JUDGES.

Power at Chambers—Default Judgments.

1. Where a default has been entered in a case where unliquidated damages are claimed, under the provisions of subd. 17 of sec. 3890, Rev. Codes, the judge has power and jurisdiction to hear testimony and to enter judgment at chambers, and the judgment so entered has the same force and effect as though entered in open court. (*Nuestel v. Spokane International Railway Co.*, 367.)

2. Where default has been entered, it is not necessary to give the defendant in default notice that the judge is going to proceed and hear testimony at chambers and enter judgment. (*Nuestel v. Spokane International Railway Co.*, 367.)

JUDGMENT.

On Pleadings.

1. When a party moves for judgment on the pleadings he, not only for the purposes of his motion, admits the truth of all the allegations of his adversary, but must also be deemed to have admitted the untruth of all his own allegations which have been denied by his adversary. (*Walling v. Bown*, 9 Ida. 184, 72 Pac. 960, approved and followed.) (*Davenport v. Burke*, 464.)

2. A judgment on the pleadings results from the fact that the answer does not put in issue any of the material allegations of the complaint, or where the pleadings show upon their face that the party is entitled to recover without proof. A judgment on the pleadings is allowable not because of lack of proof, but because of the lack of an issue. (*Davenport v. Burke*, 464.)

3. Where issues of fact are raised by the pleadings which require evidence to establish before the court can intelligently determine whether such issues are with the plaintiff or defendant, it is error to enter judgment on the pleadings. (*Davenport v. Burke*, 464.)

4. If but one defense is good, the entire pleading cannot be deemed frivolous or subject to a motion for judgment on the pleadings. (*Davenport v. Burke*, 464.)

5. Motion for judgment on the pleadings should not be granted unless it clearly appear on the face of the pleadings that there are no material issues raised by the same. (*Davenport v. Burke*, 464.)

6. *Held*, under the facts in this case that there were material issues raised by the pleadings, and that it was reversible error for the trial court, upon a mere motion, to adjudge and determine the rights of the parties to this litigation without a hearing. (*Davenport v. Burke*, 464.)

JUDGMENT (Continued).***Defaults—Entry and Opening.***

See Judges.

7. A defendant is entitled to have a judgment formally vacated and set aside on the records by direct action of the court, upon proper application therefor, even though prior thereto the sustaining of a motion to set aside a default against such defendant has had the legal effect of vacating the judgment by implication. (Leonard v. Brady, 75.)

8. Where a motion to set aside a default because prematurely entered has been filed and argued by a defendant, but is not decided, and such defendant files and argues a second motion to set aside said default, on the grounds of surprise, inadvertence and excusable neglect, and said second motion also prays that a judgment based on said default be vacated, an order of the district court, made upon motion of the plaintiff, striking from the files said second motion to set aside the default and vacate said judgment, is error. (Leonard v. Brady, 75.)

9. It is permissible for the supreme court to determine whether or not a default should have been set aside by a district court for reasons not assigned in the motion to set aside such default, where it appears that the district judge considered such reasons at the suggestion of the party resisting such motion, and that they were unknown to the moving party until the date of argument on the motion, and that the moving party showed due diligence in endeavoring to ascertain all the facts prior to that date. (Leonard v. Brady, 78.)

10. A district judge exercises a reasonable discretion in setting aside a default where it appears from the date shown by the certificate of service of summons signed by a deputy sheriff, and also from his affidavit made subsequently, that sufficient time had been allowed for the appearance of a defendant before default was entered against him, and the contrary appears by another affidavit of the same officer showing another date; and it also appears that at the time the clerk entered such default it was based upon a certificate of service of summons signed by a deputy sheriff and accompanied by an unsigned and unsealed paper purporting to be a copy of such summons, but which had not been substituted as an original by the court. (Leonard v. Brady, 78.)

11. When a default has been regularly and properly entered it can be vacated only upon a satisfactory showing being made that the defendant has a meritorious defense to the action and that he has failed to answer, or otherwise appear, by reason of mistake, inadvertence, surprise or excusable neglect. (Domer v. Stone, 279.)

JUDGMENT (Continued).

12. In order to vacate a default it is incumbent upon the defendant to show that his mistake was one of fact and not of law, and the neglect of a lawyer to familiarize himself with the law governing the practice of the forum wherein his case is pending cannot be held to be excusable. (*Domer v. Stone*, 279.)

13. *Held*, that the court did not abuse its discretion in refusing to set aside the default entered against the appellant. (*Darwin v. Darwin*, 303.)

14. An application to set aside a default is addressed to the sound, legal discretion of the trial court, and unless it is made to appear that such discretion has been abused, the order made on such application will not be disturbed upon appeal. (*Nuestel v. Spokane International Railway Co.*, 367.)

JUDICIAL NOTICE.

See Evidence, 1.

JURISDICTION.

See Courts.

JURY.***Challenges to Jurors.***

1. The court did not err in denying challenges to certain jurors on the ground of implied or actual bias. (*State v. Clark*, 48.)

Jurors Reading Newspapers.

2. In this case the court ordered that if any daily newspapers were given to the jurors during the course of the trial any report of the proceedings of the trial therein contained should be cut from such papers or that the members of the jury should not read such report. It appears that during the trial a certain daily newspaper published a purported report of said proceedings including a purported dying declaration of the deceased, which, so far as is disclosed in the record, was never made. Although the order of the court excluding such newspaper report from the jury does not appear in the reporter's transcript, it does appear from an affidavit which was incorporated in the bill of exceptions and statement of the case upon motion for a new trial which was stipulated by counsel for both parties to be true and correct and which was settled and allowed as such by the trial court. *Held*, that said matter of the introduction of said newspapers into the jury-room is properly before this court for consideration upon appeal from the order overruling and denying the motion for a new trial. (*State v. Tilden*, 262.)

JURY (Continued).

3. If the bailiff cut the articles complained of from the newspapers before they were given to the jurors or if no member of the jury read said articles, it was incumbent upon counsel for the respondent to show such fact in opposition to the motion for a new trial and the failure so to do raises a presumption that the newspapers, containing such articles, got into the possession of the jury and were read by its members. (*State v. Tilden*, 262.)

4. Upon a showing made by appellant that the jury was permitted to read said newspapers, in the absence of a showing upon the part of respondent that the articles complained of had been cut therefrom or that none of the jury read said articles, the court should have arrested the judgment and granted a new trial. (*State v. Tilden*, 262.)

Chance Verdict.

5. One of the attorneys for appellant filed his affidavit in support of a motion for a new trial, alleging that he had been told by members of the jury that the verdict was reached as the result of chance, and detailing certain purported facts which, if true, would amount to misconduct on the part of the jury. The respondent filed the affidavits of two members of the jury denying that chance was resorted to and showing that the conduct of the jury was in all respects, regular and proper. *Held*, that the trial judge was justified in reaching the conclusion that appellant's contention was not established. (*Graham v. Coeur D'Alene & St. Joe Transportation Co.*, 454.)

JUSTICES' COURTS.

See Courts.

LACHES.***In General.***

Lapse of time alone is not sufficient to justify a dismissal of the action. Where a defense of laches is sustained, it is upon the theory that the delay, together with other circumstances in the case, satisfactorily shows that the cause of action has been abandoned, or because it satisfactorily appears that it has resulted in injury to someone not responsible for the delay, and unless it does so appear, or if the theory, or presumption, is overcome by other facts and circumstances, the defense should not prevail. (*Smith v. Faris-Kesl Construction Co.*, 407.)

LARCENY.***Information.***

1. An information may properly be divided into four parts: 1, the caption, 2, the inducement or commencement, 3, the charging part, and 4, the conclusion. (*State v. Flower*, 223.)

LARCENY (Continued).

2. The most substantial part of the information is the charging part, and the charging part of every criminal information for grand larceny must not only name the person charged but it must state what was stolen by that particular person and where and when it was stolen, and if those things are not stated, the information is not sufficient to charge a public offense. (State v. Flower, 223.)

3. An information which in the caption contains the names of several persons all but one of which are thereafter contained in the charging part of the information, is not sufficient to charge the person with a crime whose name is thus omitted from the charging part. (State v. Flower, 223.)

Husband and Wife.

4. Under the laws of this state, the domicile of the husband is presumed to be the domicile of the wife, and under the provisions of sec. 2675, Rev. Codes, the husband is the head of the family and may choose any reasonable place or mode of living, and the wife must conform thereto; and in case the husband commits the crime of grand larceny and takes the personal property stolen to his residence where his wife and family reside, it would take other and further evidence to convict the wife than the mere fact that such stolen property was found in the home where she resided with her husband. (State v. Flower, 223.)

5. The evidence *held* not sufficient to sustain the verdict of guilty against Idell Flower. (State v. Flower, 223.)

6. *Held*, that instructions Nos. 6 and 8 correctly state the law, are not contradictory, and the court did not err in giving them. (State v. Flower, 223.)

7. *Held*, that the defendants Phoebe Luke and Idell Flower must be discharged and released from custody under the judgment entered by the trial court. (State v. Flower, 223.)

LEGISLATURE.

See Appropriations.

LIEN OF VENDOR.

See Vendor and Vendee, 1-4.

LIENS.

See Logs and Logging, 3, 4; Mechanics' Liens.

LIQUORS.

See Intoxicating Liquors.

LIS PENDENS.

In General.

Sec. 4142, Rev. Codes, provides for the filing of a *lis pendens* in actions affecting the title to or right of possession of real property, but this is necessary only for the purpose of giving record notice to subsequent purchasers and encumbrancers of the property who have not actual knowledge of the action, or of the claim upon which it is based, and, where a subsequent purchaser has full knowledge of a mechanic's lien in a suit to foreclose such lien, a contention that in order to charge such purchaser with notice of the pendency of the suit a *lis pendens* must be filed cannot be sustained. (Smith v. Faris-Kesl Construction Co., 407.)

LIVESTOCK.

See Constitutional Law, 4-10.

LOGS AND LOGGING.

Contract to Deliver Logs.

1. It is the duty of one who contracts to deliver logs, in the absence of a provision in the contract to the contrary, to provide all necessary means, including roads and rollways, to enable him to complete the delivery. (Huber v. Blackwell Lumber Co., 373.)

2. A party who has failed to perform his contract in full to deliver logs may recover compensation for the logs delivered according to the contract price, less damages occasioned by his failure to complete the contract. (Huber v. Blackwell Lumber Co., 373.)

Lien on Logs—Pleading.

3. While it is the correct practice in a case of this kind to allege all the ultimate facts made necessary by statute to create a valid lien, and while the requirements in this behalf are not complied with by attaching a copy of the notice of claim to the complaint as an exhibit, where the defendant answers and denies the existence of such facts, the allegations of the answer are deemed to be controverted by the plaintiff and the issue is thus placed before the court. (Schultz v. Rose Lake Lumber Co., 528.)

4. A claim of lien, valid in all other particulars, is not void as against parties thereto by reason of not being filed with or recorded by the lumber inspector as provided by sec. 1503, Rev. Codes. (Schultz v. Rose Lake Lumber Co., 528.)

MALPRACTICE.

See Physicians and Surgeons.

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MANDAMUS.

In General.

1. A writ of *mandamus* may be issued from this court to any inferior tribunal to compel the performance of an act which the law especially enjoins upon such tribunal as a duty. (Blackwell Lumber Co. v. Flynn, 632.)

2. In this case the acts which the law especially enjoined upon the district judge were performed when he ruled upon the demurrer and entered a judgment, and if error was committed in the performance of such duty the plaintiff herein has its remedy by appeal to this court. (Blackwell Lumber Co. v. Flynn, 632.)

3. The facts alleged in the petition examined and held to be insufficient to invoke relief by *mandamus*. (Blackwell Lumber Co. v. Flynn, 632.)

MANSLAUGHTER.

See Homicide.

MASTER AND SERVANT.

Employers' Liability Act.

1. The defendant owns and operates a sawmill at Winchester in Lewis county, and employed the plaintiff to pile or deck logs that were delivered at a point about six miles from said sawmill, which logs were to be conveyed to said mill and manufactured into lumber. While at work under said employment the accident causing the injury occurred, and the complaint was framed on the theory that this action is governed by the provisions of the Employers' Liability Act (Sess. L. 1909, p. 84). *Held*, under the facts of this case, that the trial court erred in trying the case upon the theory that it came within the provisions of said Employers' Liability Act. (Sumey v. Craig Mountain Lumber Co., 721.)

2. The first section of said act provides, among other things, that "Every employer of labor in or about a railroad, street railway, factory, workshop, warehouse, mine, quarry, engineering work, and any building which is being constructed, repaired, altered or improved, . . . shall be liable to his employee or servant for a personal injury received by such servant or employee," etc. *Held*, that since the plaintiff was at work six miles or more from the sawmill of plaintiff, he was not at work "in or about" said sawmill, and therefore this action does not come within the provisions of said act. (Sumey v. Craig Mountain Lumber Co., 721.)

3. *Held*, that said Employers' Liability Act does not govern every case of an employer's liability for injuries to his servant, but is only applicable to the specific cases enumerated in the act, being intended to supersede only so far the common-law duty of an em-

MASTER AND SERVANT (Continued).

ployer to his employee and takes the place of the common-law liability in cases to which it is applicable. (*Sumey v. Craig Mountain Lumber Co.*, 721.)

See Damages, 12-18; Negligence; Work and Labor.

MECHANICS' LIENS.*In General.*

1. A mechanic's lien extends only to such right, title and interest as the owner, at whose instance the improvement was made, had in the property at the time the lien attached, and a purchaser at a sale to satisfy said lien can acquire no greater right, title or interest than that. (*Smith v. Faris-Kesl Construction Co.*, 407.)

2. In this case the lien attached to such right, title and interest as the Canyon Canal Company, Limited, had in the property at the time such lien attached to it, subject to the prior lien, if any, now existing and to the same extent does exist, of a certain mortgage given to secure the payment of bonds of said canal company in the sum of \$350,000. (*Smith v. Faris-Kesl Construction Co.*, 407.)

3. While the appellant construction company which employed the respondent does not own the property against which the lien is sought to be foreclosed, it owes the money sued for, and it was by reason of its failure to pay its debt that the expense of employing respondent's attorneys was incurred. The attorneys' fee is an incident of the judgment against said appellant, and it is liable therefor under sec. 5121, Rev. Codes. (*Smith v. Faris-Kesl Construction Co.*, 407.)

Enforcement.

4. When an issue of laches is presented by the answer of one of the appellants and it appears from the record that the trial of the case was commenced the next day after said appellant filed its answer; that its codefendant made no complaint of the delay which had theretofore occurred and that no motion to dismiss the action for failure to prosecute was made; and when the record does not disclose that said delay was due to the fault of the respondent, nor that either of the appellants was injured thereby; and when the record fails to disclose any fact from which it may be inferred that it was ever the intention of the respondent to abandon his claim of lien, the finding of the trial court that respondent was not guilty of laches will not be disturbed. (*Smith v. Faris-Kesl Construction Co.*, 407.)

5. In order to establish a waiver of lien the intention to waive must clearly appear, and such waiver will not be presumed or implied, contrary to the intention of the party whose rights would be injuriously affected thereby unless by his conduct the opposite

MECHANICS' LIENS (Continued).

party was misled to his prejudice into the honest belief that such waiver was intended or consented to. The facts in this case considered and *held* not to constitute a waiver of the lien but only the priority thereof to a certain mortgage. (*Smith v. Faria-Keal Construction Co.*, 407.)

MISCONDUCT OF COUNSEL.

See Trial, 1.

MORTGAGES.

See Chattel Mortgages.

MUNICIPAL CORPORATIONS.***Nuisance—Ditch in Street.***

1. Where a ditch is constructed under a contract with the state to reclaim certain lands included in a Carey Act Irrigation project, and thereafter a town or city extends its limits so that one of the streets of such extension is so platted as to include such ditch, and thereafter the city council passes an ordinance requiring such ditch to be covered and declaring it to be a nuisance if not covered, such ordinance *held* invalid when applied to the ditch in question. (*City of Twin Falls v. Harlan*, 769.)

2. *Held*, that the city of Twin Falls as a municipality of the state has not the power or authority to declare a ditch constructed under the laws and supervision of the state a nuisance. (*City of Twin Falls v. Harlan*, 769.)

3. Because a city fails to perform a duty that devolves upon it, a person cannot be punished for a condition resulting from such nonperformance. (*City of Twin Falls v. Harlan*, 769.)

4. *Held*, under the facts of the case and the law, that it was the duty of the city to cover said ditch if it was considered dangerous, or otherwise to protect the people from such danger. (*City of Twin Falls v. Harlan*, 769.)

5. *Held*, that a ditch or canal that was constructed prior to the time that a town or city was located along it occupies substantially the same position with reference to the city and its inhabitants as would a natural stream. (*City of Twin Falls v. Harlan*, 769.)

6. A right conferred or protected by the law cannot be overthrown or impaired by any authority of the city council derived from the police power. (*City of Twin Falls v. Harlan*, 769.)

7. *Held*, that the ditch in question is maintained and operated by the company in the usual manner, and that no unusual conditions exist, and nothing is shown to be harmful or dangerous aside from

MUNICIPAL CORPORATIONS (Continued).

the fact that people live near it and may fall into it. (*City of Twin Falls v. Harlan*, 769.)

8. *Held*, that the duty to cover said ditch devolves upon the city, and that the city cannot impose such duty on the canal owner by declaring said ditch a nuisance. (*City of Twin Falls v. Harlan*, 769.)

9. *Held*, that because of the change made in that part of said ditch that runs through the Murtaugh Addition and the consent thereto by the city, the doctrine of estoppel is applicable to said city, and that the covering of said ditch through said addition is a matter between the city and the person who made the change. (*City of Twin Falls v. Harlan*, 769.)

Extension of City Limits.

10. Sec. 9 of the act of Feb. 9, 1899 (Sess. Laws, 1899, p. 109), was not amended or repealed, either directly or by implication, by the act of March 8, 1905 (Sess. Laws 1905, p. 391), prescribing the method for annexing adjacent territory to cities, towns or villages. (*Sanders v. City of Coeur d'Alene*, 353.)

11. *Held*, that under the facts of this case, where it appears that the right of way of the Inland Empire Railway Company, 200 feet in width, intervened between the city of Coeur d'Alene and the Taylor Park Addition to Coeur d'Alene, the territory sought to be annexed, at the time the annexation ordinance was passed on July 26, 1907, said territory came properly within the purview of contiguous or adjacent territory under the provisions of said sec. 9 of the act of 1899, and was at that time legally annexed to the city of Coeur d'Alene. (*Hatch v. Consumers' Co., Ltd.*, 17 Ida. 204, 218, 104 Pac. 670, 40 L. R. A., N. S., 263, cited and followed.) (*Sanders v. City of Coeur d'Alene*, 353.)

Bonds for City Hall.

12. *Held*, that the city of Gooding can legally vote bonds for the purpose of purchasing an existing building for a city hall, and that the entire proceedings in calling the election and voting the bonds and canvassing the results and the notice of the sale of the bonds and all other proceedings in relation thereto were regular and legal. (*Thomas v. City of Gooding*, 624.)

Officers Interested in Contracts.

13. Under the provisions of sec. 255, Rev. Codes, municipal as well as other officers are prohibited from being interested in any contract made by them in their official capacity with their municipality. (*Collman v. Wanamaker*, 342.)

NATIONAL BANKS.

See Banks and Banking, 5-7.

NEGLIGENCE.

Personal Injuries—Proximate Cause.

1. Where it appears from the allegations of the complaint that the plaintiff relies upon the unsafe and unsuitable condition of the appliance or tools that he has to use in his work, in case of personal injury, in order to recover he must prove on the trial that such unsafe and unsuitable instrument was the proximate cause of his injury. (*Antler v. Cox*, 517.)

2. Where damages for personal injuries are claimed in an action which may have been occasioned by one of two causes, for one of which the defendants were responsible, and for the other they were not, the plaintiff must fail if his evidence does not show that the injuries were the result of the cause for which the defendants were responsible. (*Antler v. Cox*, 517.)

3. A proximate cause is that cause from which the effect might be expected to follow without the concurrence of any unusual circumstances. (*Antler v. Cox*, 517.)

4. *Held*, that the court did not err in granting a nonsuit. (*Antler v. Cox*, 517.)

See Damages.

NEW TRIAL.

In General.

1. Where a decision is made in open court in the presence of counsel and at the request of counsel the time is extended to file his motion for a new trial, such order does not extend the time for filing the notice of intention to move for a new trial. (*Howes v. Dols*, 576.)

2. *Held*, under the facts of this case that counsel for appellant had actual notice of the decision and that the court did not extend the time for filing the notice of intention to move for a new trial. (*Howes v. Dols*, 576.)

3. *Held*, that the court did not err in granting the motion to strike the notice of intention to move for a new trial from the files, and denying the motion for a new trial. (*Howes v. Dols*, 576.)

4. *Held*, that the court did not err in refusing to grant a new trial. (*State v. Bouchard*, 500.)

See Appeal and Error; Criminal Law, 16.

NORMAL SCHOOL.

See School.

NOTICE.

See Appeal and Error, 2; Appearance; Lis Pendens.

NUISANCE.

In General.

1. Under the provisions of sec. 3659, Rev. Codes, nothing which is done or maintained under the express authority of the statute can be deemed a nuisance. (City of Twin Falls v. Harlan, 769.)

2. Where a trial court judicially declares a thing to be a nuisance, its judgment is subject to review on appeal the same as any other judgment it may render. (City of Twin Falls v. Harlan, 769.)

3. The general power of a city to declare, prevent or abate a nuisance does not include the power to declare anything a nuisance which is not one in fact nor one *per se*. (City of Twin Falls v. Harlan, 769.)

Ditch.

4. Where a ditch has been constructed and operated in accordance with the law, it is not a nuisance, and can only become one by reason of the manner in which it has been maintained and operated; and the fact that a municipality subsequently extends a street along and includes in it the right of way for such ditch does not convert such ditch into a nuisance. (City of Twin Falls v. Harlan, 769.)

See Municipal Corporations, 1-9.

OFFICERS.

Creation and Filling of Office.

1. The legislature may create an office or offices not otherwise provided for, nor prohibited, by the constitution, and may fix the method of filling such office or offices; and when so created, the appointment or selection of officers to fill such offices may be made either by the chief executive, or by any person, board, corporation or association of individuals as provided by law, and such appointment would not be in conflict with the constitution or an improper exercise of power properly belonging to the executive department of the state government. (Ingard v. Barker, 124.)

2. The framers of the constitution could not foresee what offices might be created by laws subsequently enacted, but they provided that such offices should be filled by the Governor unless the appointment or election should be otherwise provided for. (Ingard v. Barker, 124.)

3. In the absence of a constitutional provision to the contrary, any one of the three departments of the government may, under the authority of a statutory provision, appoint for any class of office in its department. (Ingard v. Barker, 124.)

OFFICERS (Continued).

4. The power to create offices and provide the method of filling same is, unless otherwise provided for in the constitution, vested in the legislature. (*Ingard v. Barker*, 124.)

5. The legislature may limit the power of the chief executive in the matter of making appointments. (*Ingard v. Barker*, 124.)

Anti-nepotism Law.

6. *Held*, that the title to the anti-nepotism bill or act is sufficiently broad to include and cover all of the provisions of said act and is not repugnant to the provisions of sec. 16, art. 3, of the state constitution. (*Barton v. Alexander*, 286.)

7. "Associates in office" are those who are united in action; who have a common purpose; who share the responsibility or authority and among whom is reasonable equality; those who are authorized by law to perform the duties jointly or as a body. (*Barton v. Alexander*, 286.)

8. *Held*, that the commandant of the Soldiers' Home is not an "associate in office" of the board of trustees of the Soldiers' Home. (*Barton v. Alexander*, 286.)

9. The phrase, "associates in office," as used in said act refers to officers who are required under the law to act together, each having substantially equal authority in matters coming before them as boards or councils under the law. (*Barton v. Alexander*, 286.)

10. Said act prohibits the officers therein named, or boards or councils composed of such officers, from appointing anyone to office related to them or to any member of such board or council within the third degree by affinity or consanguinity. (*Barton v. Alexander*, 286.)

11. Said act prohibits the officers therein mentioned from making appointments on agreement or promise with other officers. (*Barton v. Alexander*, 286.)

12. If a person is illegally appointed under the provisions of said act, the officer of the state, district, county, city or other municipal subdivision of the state who pays out of any public funds under his control or draws or authorizes the drawing of any warrant or authority for the payment out of any public funds of the salary, wages, pay, or compensation of any such ineligible person, knowing him to be ineligible, is guilty of a misdemeanor and may be punished as provided in the first section of said act. (*Barton v. Alexander*, 286.)

13. If a person is legally appointed and eligible to hold the office to which he is appointed, the proper board or officer is not prohibited by said act from passing upon and allowing the claim of such appointee for salary, or wages, although such appointee may be re-

OFFICERS (Continued).

lated to such officer or a member of the board which is required under the law to pass upon such claim. (*Barton v. Alexander*, 286.)

14. Said act is a police regulation and its provisions are reasonable and enforceable and not unconstitutional. (*Barton v. Alexander*, 286.)

15. Under the provisions of sec. 5705, Rev. Codes, the degrees of kindred are computed according to the rules of the civil law, which rules are applicable to the act in question. (*Barton v. Alexander*, 286.)

16. *Held*, that it was not intended that the provisions of said act should operate retrospectively. (*Barton v. Alexander*, 286.)

17. Where appointments of persons related to officers within the prohibited degree have been made prior to the going into effect of said act, such appointees cannot legally be paid out of the public funds any salary or wages for services rendered subsequent to the going into effect of said act, to wit, the 8th day of May, 1915. (*Barton v. Alexander*, 286.)

18. Irrigation, drainage, improvement and school districts do not come within the provisions of said act, since they are not municipal subdivisions of the state and are not specially included in said act. (*Barton v. Alexander*, 286.)

19. *Held*, that said board of trustees of the Soldiers' Home will not violate any of the provisions of said act by retaining the plaintiff as matron of said Home. (*Barton v. Alexander*, 286.)

Powers and Duties.

20. Where a statute imposes a duty upon one for the protection and benefit of others, and does not invest him with discretionary power in the matter, if he neglects to perform the duty, he is liable to those for whose protection the statute is enacted for any damage resulting proximately from his neglect, whether he be actuated by malice, a corrupt motive or otherwise. (*State v. Title Guaranty and Surety Co.*, 752.)

21. Where power is given by statute to a public officer in permissive language—as that he *may* do a certain thing,—the language used will be regarded as peremptory if the public interest or individual rights required that it should be so regarded. (*State v. Title Guaranty and Surety Co.*, 752.)

Removal and Quo Warranto—Exacting Illegal Fees.

22. Under the provisions of sec. 7459, Rev. Codes, for the removal of officers, if proceedings are brought thereunder before the term of the officer expires, the expiration of the term pending the determination of the cause does not work a dismissal of the proceeding. (*Daugherty v. Nagel*, 511.)

OFFICERS (Continued).

23. The proceedings under sec. 7459, Rev. Codes, are in the nature of a *quo warranto* and are *quasi* criminal. (Daugherty v. Nagle, 511.)

24. Under the provisions of sec. 7459, Rev. Codes, providing summary proceedings for the removal of certain officers, there are only two offenses for which an action to remove a defendant may be prosecuted, to wit: (1) For charging and collecting illegal fees for services rendered or to be rendered in his office; (2) Where the officer has refused or neglected to perform the official duties pertaining to his office. (Collman v. Wanamaker, 342.)

25. *Held*, that an information that charges a village officer with having sold certain merchandise to his village and collected pay therefor from the village does not charge the defendant with any offense for which he may be removed, under the provisions of said sec. 7459. (Collman v. Wanamaker, 342.)

26. The word "fees" as used in said section means a reward for personal services performed or to be performed; it designates the sum prescribed by law as charges for services rendered by public officers. (Collman v. Wanamaker, 342.)

27. The illegal selling of property to a municipality by an officer thereof and collecting pay therefor is not the collection of an illegal fee as contemplated by the provisions of said sec. 7459. (Collman v. Wanamaker, 342.)

28. The case of *Robinson v. Huffaker*, 23 Ida. 173, 129 Pac. 334, cited and modified. (Collman v. Wanamaker, 342.)

29. It is not charged in the information that the defendant failed or neglected to perform an official duty, but it is charged that he did act and allow illegal claims; hence the charge does not come within the purview of said sec. 7459. (Collman v. Wanamaker, 342.)

30. *Held*, that the information does not charge the defendant with any act for which he may be removed from office, under the provisions of sec. 7459, and that the court did not err in sustaining the demurrer to the information and dismissing the proceeding. (Collman v. Wanamaker, 342.)

See Counties, 5-8; Horticultural Inspectors; Municipal Corporations, 13.

PAROL AGREEMENTS.

See Pleading, 2, 3.

PARTIES.

See Courts, 12.

PAYMENT.

See Tender.

PERSONAL INJURIES.

See Damages; Master and Servant; Negligence.

PHYSICIANS AND SURGEONS.

Negligence and Malpractice.

1. Where an action is brought to recover damages on account of the wrongful, negligent and careless leaving of a sponge in the abdomen of a patient, and on account of the negligence of defendant in permitting said sponge to remain in said patient's abdomen an intestinal obstruction was created, resulting in a partial closing of a portion of the intestinal canal and causing a partial paralysis and obstructions thereof, and by reason of such wrongful and negligent acts and for no other reason and as a direct result thereof the patient died, it is incumbent upon the plaintiff to prove said allegations by a preponderance of the evidence and show that the presence of said sponge in the abdomen of the patient was the direct and proximate cause of the death of the patient. (Ruble v. Busby, 486.)

2. Held, that the evidence is sufficient to show that the adhesive condition of the intestines of the patient caused her death and that such adhesive condition was not caused by the presence of a sponge, and that the evidence is sufficient to support the verdict of the jury. (Ruble v. Busby, 486.)

3. Held, that the court did not err in giving or refusing to give certain instructions. (Ruble v. Busby, 486.)

4. Held, that the court did not err in refusing to admit certain evidence. (Ruble v. Busby, 486.)

PLEADING.

In General.

1. A denial on information and belief of matters of public record is no denial, and does not put in issue the fact alleged in the complaint which it attempts to deny. (First National Bank of Iowa City v. Walker, 199.)

2. Where an action is brought on a written contract and as a defense the defendant pleads a contemporaneous oral agreement to the effect that it released him from a performance of the written contract, the court did not err in striking out such defense on motion. (Fralick v. Mercer, 360.)

3. The general rule is that a plea or answer setting up a parol contemporaneous agreement inconsistent with the contract sued on is bad on demurrer or may be stricken out on motion. (Fralick v. Mercer, 360.)

PLEADING (Continued).

Amendments.

4. *Held*, that the court did not abuse its discretion in denying defendant's motion to amend his answer. (*Fralick v. Mercer*, 360.)

5. Where the court allows an amendment to the complaint and thereafter offers to continue the case at the cost of the plaintiff, and the defendant indicates that he does not desire the case continued, *held*, that the court did not err in permitting the amendment. (*Lorang v. Randall*, 259.)

POLICE COURT.

See District Court, 21.

POLICE POWER.

See Constitutional Law.

PRINCIPAL AND AGENT.

Ratification of Unauthorized Act.

1. A principal may ratify an unauthorized act of his agent if, at the time of such ratification, he has knowledge of all of the material facts connected with the transaction, and the ratification may be either by words or by conduct indicating an intention on the part of the principal to adopt the act as his own; such intention is implied from an acceptance of the benefits of the unauthorized act. (*Blackwell v. Kercheval*, 537.)

2. Where a principal, with knowledge of the facts, ratifies the unauthorized act of an agent, principal and agent are invested with the same rights and obligations respectively as if the transaction had been previously authorized, and the agent is thereby relieved from personal responsibility by reason of such unauthorized act, whether he exceeded or departed from his instructions, or was a mere volunteer with regard to the conduct in question. (*Blackwell v. Kercheval*, 537.)

3. One who voluntarily accepts the benefits of an unauthorized act by another, ratifies the act, and takes it as his own with the burdens incident thereto. One may not appropriate the benefits of a transaction made in his behalf, and while retaining them, disavow the burdens or disadvantages arising out of it. (*Blackwell v. Kercheval*, 537.)

4. A principal's ratification of the act of his agent requires no new consideration. (*Blackwell v. Kercheval*, 537.)

5. *Held*, that the complaint in this case states a cause of action, and that the demurrer should have been overruled and the defendant required to answer. (*Blackwell v. Kercheval*, 537.)

PRINCIPAL AND AGENT (Continued).

6. Where the admitted facts surrounding a given transaction are such that reasonable men could draw different conclusions as to whether or not there has been a ratification by the principal of the unauthorized act of an agent, or the extent of such ratification, the question is one of fact to be determined by the jury under proper instruction from the court, and it is error to sustain a general demurrer to a complaint, where it appears from the allegations that questions of fact are involved. (*Blackwell v. Kercheval*, 537.)

PRINCIPAL AND SURETY.*Liability on Bond—Interest.*

In cases of this kind, where the amount claimed is definite and certain or can be readily ascertained—of a character not wholly unliquidated—in the absence of a stipulation in the bond to the contrary and in the absence of a controlling statutory provision, interest begins to accumulate as against the surety on the bond at the same time as against the principal obligor. If a breach in the conditions of the bond creates a debt on the part of the principal, it becomes the debt of the surety as well, and if it is unnecessary to make demand upon the one in order to start the interest period, none need be made upon the other. (*State v. Title Guaranty and Surety Co.*, 752.)

PROBATE COURT.

See Courts.

PROCESS.*Affidavit for Publication of Summons.*

Sec. 4145, Rev. Codes, as amended, Sess. Laws 1909, p. 186, setting forth the requirements for the publication of summons against a nonresident defendant or one whose whereabouts are unknown, and prescribing that "an affidavit setting forth in ordinary and concise language any of the grounds as above set forth upon which the publication of the summons is asked for, shall be sufficient without setting forth or showing what efforts have been made or what diligence has been exerted in attempting to find the defendant," does not dispense with the use of due diligence to ascertain the residence or postoffice address of the defendant, and the mere assertion of diligence in the affidavit is not a compliance with the statute. Where it is shown that by the exercise of ordinary diligence such facts might have been ascertained, the court will be deemed not to have acquired jurisdiction over a defendant by publication of summons based on such affidavit. (*Lohr v. Curley*, 739.)

PROHIBITION, WRIT OF.

In General.

1. Before a writ of prohibition will lie, two contingencies must arise; first, that the tribunal, corporation, board or person is proceeding without or in excess of its jurisdiction; second, that there is not a plain, speedy and adequate remedy in the ordinary course of law. (Secs. 4994 and 4995, Rev. Codes.) (*Olden v. Paxton*, 597.)

2. *Held*, under the facts in this case, petitioner has a plain, speedy and adequate remedy in the ordinary course of law, and no pressing necessity appearing to warrant the interposition of the writ of prohibition, it is denied. (*Olden v. Paxton*, 597.)

PUBLIC LANDS.

See Constitutional Law, 4-10; Irrigation, 9-21.

PUBLIC OFFICERS.

See Officers.

PUBLIC UTILITIES COMMISSION.

Fixing Rates.

1. Under sec. 63 (a) of the public utilities statute (Sess. Laws 1913, p. 286), this court is vested with substantially the same authority in reviewing the proceedings of the Public Utilities Commission as on appeal, and is given ample power to review the orders of the commission and correct any mistakes that may have been made. (*Idaho Power etc. Co. v. Blomquist*, 26 Ida. 222, 141 Pac. 1083, cited and approved.) (*Murray v. Public Utilities Commission*, 603.)

2. When proceeding under sec. 30 (a) of the public utilities statute (Sess. Laws 1913, p. 268), empowering the Public Utilities Commission to fix rates to be charged by the proprietor of a public utility, before lowering an existing rate the commission must first find that it is unjust or unreasonable. On the other hand, before raising an existing rate the commission must first find that it is insufficient. Upon finding that a certain rate is discriminatory, preferential or in any way violative of law, the commission may change it so as to correct or eliminate the objectionable feature. The rate as fixed must be a fair one to the consumers or patrons of the utility, but it must also be sufficient to assure the proprietor of the utility a fair and safe return on his investment, and to encourage rather than discourage the investment of capital in public utility enterprises in this state. (*Murray v. Public Utilities Commission*, 603.)

3. In determining the value of a public utility plant for the purpose of fixing rates, the rule of "cost of reproduction less deprecia-

PUBLIC UTILITIES COMMISSION (Continued).

tion" is the correct general rule or principle to be applied. In applying this rule the worth of a new plant of equal capacity, efficiency and durability, with proper discount for defects in the old plant and actual depreciation for use, should be the measure of value, rather than the cost of exact duplication. (Murray v. Public Utilities Commission, 603.)

4. In making deduction for the item of depreciation in appraising the value of a public utility plant, such deduction should be allowed only for actual, tangible depreciation, and not for theoretical, or "accrued depreciation"; and if it be shown that the plant is in good operating condition, and giving on the whole as effective service as a new plant, the question of depreciation may be disregarded. (Murray v. Public Utilities Commission, 603.)

5. The actual value of a water right as an item in the worth of a public utility plant should be considered and arrived at by the same rule as applied in the case of any other class of property. The value of such water right should be measured by the fair market value of a similar water right in the same locality, if that can be shown. If no market value can be established, then the opinion of competent witnesses as to the actual value may be considered. The fair present value of the water right is the ultimate fact to be found and considered by the commission and the court. (Murray v. Public Utilities Commission, 603.)

6. *Held*, that the commission erred in refusing to consider the actual present value of the water right of plaintiff as an element in the value of his plant, except to the extent of \$2,000 which was paid for it by plaintiff to certain Indians who asserted a claim to the water in question. (Murray v. Public Utilities Commission, 603.)

7. Evidence on behalf of the proprietor of a public utility to the effect that certain expenses have been incurred in building up the business may be considered by the commission as one of the elements of value, under the head of "going concern value." The fact that it is a going concern, in successful operation, should be considered in estimating the value of the physical property and assets, but the commission should not attempt to calculate or segregate any specific theoretical value which might attach to the plant or system merely by reason of the fact that it is a going concern. (Murray v. Public Utilities Commission, 603.)

8. *Held*, that plaintiff has not established his possession of a valid, existing franchise to operate his utility in the city of Pocatello, and that the commission did not err in refusing to consider the matter of the value of the franchise in its decision and order. As to whether the value of a franchise should be considered in fixing value for rate making purposes, *quaere*. (Murray v. Public Utilities Commission, 603.)

PUBLIC UTILITIES COMMISSION (Continued).

9. *Held*, that if, in constructing a new plant, of equal capacity, efficiency and durability to plaintiff's present plant, it would be reasonably necessary to place or replace mains and hydrant connections at places where paving has been laid, proper allowance should be made therefor, but if such mains and hydrant connections could be located as effectively in other places where paving has not been laid, then no allowance should be made therefor. (*Murray v. Public Utilities Commission*, 603.)

10. The personal property of the proprietor of a public utility, such as office furniture, horses, wagons, tools and materials on hand, and the cost of improving ground around a reservoir, are proper items to be considered by the Public Utilities Commission in estimating the value of the plant, if they represent an investment reasonably necessary to the carrying on of the business of the utility and rendering efficient service to the public; otherwise not. (*Murray v. Public Utilities Commission*, 603.)

11. In order to justify the Public Utilities Commission in ordering enlargements or extensions of a public utility plant, the commission must be satisfied from the evidence, first, that the existing plant is not reasonably sufficient to render adequate service; second, that the extension or enlargement is within the scope of the original professed undertaking of the proprietor of the utility; third, that after the completion of the enlargement or extensions the proprietor will be assured of a fair return upon his whole legitimate investment; fourth, that the particular enlargements or extensions in question are reasonably necessary to insure reasonably adequate service. (*Murray v. Public Utilities Commission*, 603.)

12. *Held*, that in the absence of a showing that the plaintiff in this case has a valid existing franchise to operate his utility in the city of Pocatello, an order by the Public Utilities Commission requiring him to extend and enlarge his plant is not reasonable, and that said commission had no authority to make such order. (*Murray v. Public Utilities Commission*, 603.)

QUIETING TITLE.*In General.*

1. In an action to quiet title, plaintiff will not be permitted to rely upon the weakness of defendant's title in order to establish a better title in himself, but if he is entitled to recover at all, it must be upon the strength of his own title. (*Washington State Sugar Co. v. Goodrich*, 26.)

2. Where, in a suit to quiet title brought by the holder of a tax deed for a city lot, the plaintiff makes affidavit for publication of summons to the effect that the former owner of the property,

QUIETING TITLE (Continued).

named as a defendant, could not after due diligence be found within the state of Idaho or at all, and that the plaintiff could not after due diligence ascertain the residence or postoffice address of the said defendant, when it appears that the true name and address of said former owner are given in full upon the county assessment-roll, both before and after the sale of said property for delinquent taxes, and at the time said suit was brought, *held*, that the maker of said affidavit did not use the diligence that the law requires. (*Lohr v. Curley*, 739.)

3. The evidence *held* sufficient to support the finding of facts. (*Williams v. Turner*, 220.)

To Water.

4. In an action to quiet title to water appropriated from a public stream, where the issue joined is one of priority, the court should find the actual appropriation made by each appropriator, the date upon which the appropriation was made and the quantity of water appropriated to a beneficial use by each. (*Washington State Sugar Co. v. Goodrich*, 26.)

QUO WARRANTO

See Officers, 22.

RAILROADS.

See Indian Reservation, 1.

RATIFICATION.

See Principal and Agent.

SALARIES.

See Counties, 5, 6.

SCHOOLS.**Normal School Fund.**

1. Under the provisions of the fourth section of an act creating and establishing a normal school fund (*Sess. Laws 1905*, p. 393), it is provided: "That perpetually from and after the first day of January, 1907, one-half of all moneys which may accrue to the said normal school fund shall be, and the same are hereby, appropriated and set apart for the support and maintenance of the said Albion State Normal School and the same shall be, and they are hereby, made available for such purpose immediately upon their being credited to the said fund." (*Evans v. Huston*, 559.)

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SCHOOLS (Continued).

2. Under the provisions of subd. 66, sec. 17, of the Rev. Codes, said act of 1905 establishing the normal school fund was continued in force. (Evans v. Huston, 559.)

3. Secs. 3 and 7 of said act of 1905 make appropriations of certain funds. (Evans v. Huston, 559.)

4. The act of 1905 makes an appropriation of the income accruing from said school fund and continues such appropriation until amended or repealed by the legislature. (Evans v. Huston, 559.)

5. *Held*, that the balance remaining in said Albion State Normal School fund and the income from that fund during the years 1915 and 1916 have been appropriated for the support and maintenance of said normal school, and are available for that purpose. (Evans v. Huston, 559.)

SHEEP INDUSTRY.

See Constitutional Law, 4-10.

SPECIAL PROSECUTOR.

See Criminal Law, 1-3.

STATE AUDITOR,***Duties and Liabilities—Criminal Responsibility.***

1. In order to warrant a conviction under sec. 6975, Rev. Codes, it must be found that the defendant officer is, in the language of the statute, "charged with the receipt, safekeeping, transfer or disbursement of public moneys." (In re Huston, 231.)

2. The state auditor in his official capacity as such officer is not the custodian of public moneys, within the meaning of sec. 6975, Rev. Codes, and is not properly classified with those public officers who receive public moneys, or are charged with safekeeping, transferring or disbursing the same, with relation to his official duties in drawing warrants on public funds. (In re Huston, 231.)

3. Sec. 6975, Rev. Codes, was intended for the punishment of that particular class of public officers who, being charged with the custody of public funds, fraudulently appropriate to their own use or the use of another a portion of such funds, in violation of their trust. (In re Huston, 231.)

4. It is not the intent of the law to hold a public official criminally responsible for a mistake of judgment, under a severe penalty in case he has made such mistake, in the absence of actual fraud, theft, conspiracy to cheat, or some felonious and unlawful attempt to deprive the state of its public moneys. (In re Huston, 231.)

STATE AUDITOR (Continued).

5. After a claim has been submitted to the state board of examiners as provided by law, and the same has been examined, audited and allowed, and the auditor directed to draw a warrant in favor of the claimant, it becomes the ministerial duty of the auditor to draw such warrant. (In re Huston, 231.)

6. If a mistake is made by the auditor in drawing a warrant upon the wrong fund or item in the same department, in the absence of collusion, theft or actual fraud on the part of the auditor, resort should be had to the civil rather than the criminal law, in accordance with the following provision of sec. 145, Rev. Codes, as amended, Sess. Laws 1913, p. 57: "For the proper performance of the duties herein enjoined upon the state auditor, as secretary of the state board of examiners, or for any unlawful or irregular payment of any account submitted against the state, the state auditor is hereby made responsible upon his official bond." (In re Huston, 231.)

7. *Held*, that as the facts alleged in the indictment do not state a public offense against the petitioner, he must be discharged, and it was so ordered. (In re Huston, 231.)

See Appropriations.

STATE ENGINEER.

See Waters and Watercourses, 1-15.

STATE HORTICULTURAL INSPECTORS.

See Horticultural Inspectors.

STATE NORMAL SCHOOL.

See Schools.

STATUTE OF FRAUDS.

See Pleading, 2, 3.

STATUTES.

Interpretation.

1. Statutes should be so construed as to give effect to each and every part thereof, if possible. (*People v. Hunt*, 1 Ida. 433.) (Ingard v. Barker, 124.)

2. Where a statute has been in force for many years, receiving a practical interpretation and accepted in all its terms, the most careful consideration should be given questions involved in its interpretation if it then be attacked as conflicting with the constitution; as, unless its language is so obscure and doubtful as to entitle

STATUTES (Continued).

it to no weight or consideration, the long-accepted, practical interpretation is more likely to be right than a newly discovered one suggested by the exigencies of current litigation. (*State v. Omaechevviaria*, 797.)

3. *Held*, that sec. 6872, Rev. Codes, which was enacted by the 12th session of the territorial legislature in 1883, re-enacted as sec. 6872; Rev. Stat. of 1887, and continued in force by sec. 2 of the schedule and ordinance contained in article 21 of the state constitution, approved by the federal government at the time Idaho was admitted to the Union, is couched in sufficiently definite language to meet the object sought to be attained. (*State v. Omaechevviaria*, 797.)

4. Where there are two constructions that may be fairly given a legislative act designed to effect a great public purpose, one of which will carry out the intent and purpose and the other will defeat the intent and purpose of the act, the former construction should be applied. (*State v. Omaechevviaria*, 797.)

5. Laws are enacted to be read and obeyed by the people, and in order to reach a reasonable and sensible construction thereof, words that are in common use among the people should be given the same meaning in the statute as they have among the great mass of the people who are expected to read, obey and uphold them. (*State v. Omaechevviaria*, 797.)

SUBROGATION.*In General.*

Facts must be alleged upon which a claim of subrogation is based, and where no such facts appear in the pleadings, it is not error for the trial court to refuse to grant such relief. (*Smith v. Faris-Keal Construction Co.*, 407.)

SUBTERRANEAN WATER.

See Waters and Watercourses, 16-26.

SUMMONS.

See Process.

SURETYSHIP.

See Principal and Surety.

SURVEYS.

See Boundaries.

TAXATION.*Payment of Taxes—Delinquent Tax Sale.*

1. Where a nonresident property owner had paid taxes on a city lot described as lot 33, block 44, of Crow's Addition to the city of

TAXATION (Continued).

Idaho Falls, from the year 1892 up to and including the year 1904, but in 1904 the tax payment was erroneously credited by the assessor and tax collector to lot 33, block 48, with the result that the taxes for 1904 on lot 33, block 44, appeared to be delinquent, and thereafter said lot was sold to the county for delinquent taxes, and subsequently a purchaser from the county obtained a tax deed therefor; *held*, that when the county issued the certificate of sale for said lot to itself, such certificate was not based upon any lien legally created against said property, and the assignment of such certificate and subsequent tax deed based thereon did not divest the rightful owner of title. (*Lohr v. Curley*, 739.)

2. If the owner of land, or one having interest therein, applies to the proper officer for the purpose of paying the tax thereon, and payment is refused or prevented by such officer through a mistake on his part, such tender of payment is the equivalent of payment of such tax, to the extent that it bars the attaching of a lien based upon actual nonpayment. (*Lohr v. Curley*, 739.)

See Highways.

TENDER.***Of Payment.***

One of the appellants, before the commencement of the action, tendered to the respondent, in full payment of the amount due to him, a sum of money which was less than was found to be due by the court, which tender was rejected. Since the said sum was tendered, not as a partial payment, but as settlement in full, and since it was less than the amount found to be due by the court, such tender did not estop the accumulation of interest upon any part of the debt. (*Smith v. Faris-Kesl Construction Co.*, 407.)

TIMBER.

See Logs and Logging.

TRANSCRIPTS.

See Appeal and Error, 5.

TRIAL.***Misconduct of Counsel.***

1. A judgment should never be reversed by reason of misconduct of counsel at the trial, unless the appellate court is of the opinion such misconduct had prevailing influence upon the jury to the detriment of appellant. (*Therault v. California Insurance Co.*, 476.)

Instructions.

2. *Held*, that the court did not err in giving certain instructions and that the instructions given by the court correctly stated the

TRIAL (Continued).

rule for the measure of damages applicable in this case. (*Fralick v. Mercer*, 360.)

See Continuances; Criminal Law; Jury; Witnesses.

TRUSTS.*Following Trust Fund.*

Held, that the rule that "an owner is always entitled to follow a trust fund wherever it may be found" does not apply to the facts in this case as the verdict shows them to have been found by the jury. (*Smith v. Wallace National Bank*, 441.)

See Courts, 11, 12.

VENDOR AND VENDEE.*Lien of Vendor.*

1. *Held*, that the evidence is sufficient to support the finding of facts. (*Farnsworth v. Pepper*, 154.)

2. Where one owns real estate, the legal title to which stands in the name of another, and he contracts to sell the same to a third party and arranges with the one who holds the legal title and the purchaser that the former shall convey the title to said real estate directly to the purchaser, the vendor of such real estate has a vendor's lien on such real estate for the purchase price thereof. (*Farnsworth v. Pepper*, 154.)

3. Under the provisions of sec. 3441, Rev. Codes, one who sells real estate has a vendor's lien thereon independent of possession for so much of the purchase price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer. (*Farnsworth v. Pepper*, 154.)

4. Under the provisions of sec. 3441, Rev. Codes, a vendor's lien is only permitted as security for the balance remaining for whatever may be due on the unpaid purchase price of the land, and the attorney's fee allowed for foreclosing such lien and any other indebtedness or liability is not made a lien by the provisions of said section. (*Farnsworth v. Pepper*, 159.)

5. Where an action is brought to foreclose a vendor's lien, the judgment or decree may provide for a deficiency judgment in case the property charged with the lien does not sell for sufficient to pay the amount of the lien. (*Farnsworth v. Pepper*, 159.)

VENUE.*Change of.*

Held, that the court did not err in overruling the demurrer to amended complaint, in denying defendant's motion for a change of

VENUE (Continued).

venue, in admitting certain evidence and in overruling the defendant's motion for a new trial. (*Van Camp v. Rodgers*, 122.)

VERDICTS.

See Jury; Trial.

WARRANTS.

See Appropriations; State Auditor.

WARRANTY.

See Deeds.

WATER COMPANIES.

See Public Utilities Commission.

WATERS AND WATERCOURSES.***Appropriation of Water—Permit from State Engineer.***

1. Where a permit to appropriate water for a beneficial use is granted by the state engineer, a total failure to commence the work within the time provided in the permit, or to complete one-fifth of the work within the time limited in the permit, cannot be cured by extending the time within which to make proof of beneficial use of the water so attempted to be appropriated. (*Washington State Sugar Co. v. Goodrich*, 26.)

2. A water right claim as filed with the state engineer is merely a declaration of intention to create a water right. Only by a compliance with the conditions of the permit does the water right claim finally become a water right. (*Washington State Sugar Co. v. Goodrich*, 26.)

3. Where one obtains a permit for the appropriation of water from the state engineer, a failure to put the water to a beneficial use or to comply with the conditions of the permit is an abandonment of the use. (*Washington State Sugar Co. v. Goodrich*, 26.)

4. One may obtain a prior right to the use of the water of a stream where he actually diverts and applies the same to a beneficial use, although he may never have applied to the state engineer for a permit to do so. (*Nielson v. Parker*, 19 Ida. 727, 115 Pac. 488, cited and followed.) (*Washington State Sugar Co. v. Goodrich*, 26.)

5. The granting by the state engineer of a permit for the right to use the waters of a stream, in and of itself, secures to the applicant no right to the use of such water, unless there be a substantial compliance with every provision of the statute affecting the issuance of such permit and a fulfillment of the conditions of the permit; a

WATERS AND WATERCOURSES (Continued).

compliance with the conditions and limitations prescribed in the permit initiates a right to the use of the water in the applicant, and said right then becomes a vested one and dates back to the issuance of said permit. (Washington State Sugar Co. v. Goodrich, 26.)

6. A right to the use of water obtained by actual diversion and application to a beneficial use is a vested right, and cannot be defeated by the subsequent issuance by the state engineer of a permit to appropriate such water, granted to another party than the prior appropriator. (Washington State Sugar Co. v. Goodrich, 26.)

7. Where suit is brought by an aggrieved party to review the decision of the state engineer in lieu of an appeal from the proceedings had before said engineer, the action is in the nature of a suit to quiet title, and must be prosecuted and conducted in the same manner as an action to quiet title to real estate, and all parties whose claims are adverse to the plaintiffs, whether they appear before the state engineer or not, are indispensable parties and must be made defendants in the action. (Washington State Sugar Co. v. Goodrich, 26.)

8. Where an application to appropriate water has been made under sec. 3253, Rev. Codes, as amended by Sess. Laws 1913, p. 136, and a permit granted, and the applicant thereafter desires to change the point of diversion, he must substantially comply with the provisions of said sec. 3264, Rev. Codes. (Washington State Sugar Co. v. Goodrich, 26.)

9. The state engineer has no authority to make any change in the point of diversion specified in his permit to appropriate that would in any way interfere with the rights of prior appropriators. (Washington State Sugar Co. v. Goodrich, 26.)

10. *Held*, that the decree of the lower court must be modified in regard to the amounts of water decreed certain appropriators. (Washington State Sugar Co. v. Goodrich, 26.)

11. The test of an appropriator's right to water for irrigation is the amount of water actually used for the beneficial purpose claimed. (Washington State Sugar Co. v. Goodrich, 26.)

12. Where one appropriates water for the operation of a sawmill and thereafter appropriations are made from the same stream by several parties for irrigation purposes, the first appropriator cannot transfer his appropriation to another to be used for irrigation purposes and thereby defeat the rights of subsequent appropriators for purposes of irrigation. (Washington State Sugar Co. v. Goodrich, 26.)

13. The duty of water depends upon the character and condition of soil, and in determining such duty reference should always be made to lands that have been properly prepared and reduced to

WATERS AND WATERCOURSES (Continued).

a reasonably good condition for irrigation. (Washington State Sugar Co. v. Goodrich, 26.)

14. *Held*, that certain findings of the court were sustained by the evidence. (Washington State Sugar Co. v. Goodrich, 26.)

15. An appropriator of water, after conducting the same to the point of intended use, has a reasonable time in which to apply such water to the use intended, but where the question of proof of such use arises, such appropriator cannot be permitted to anticipate what he might do in the future, or to make additional proof of further application to a beneficial use at a future time. (Washington State Sugar Co. v. Goodrich, 26)

Subterranean Water—Artesian Wells.

16. Where it appears that the respondents are the owners in fee of the land upon which artesian wells are located and retain the right to the control and management of water flowing from said wells to the place of distribution, and where it further appears that said respondents are the owners of virtually all of the capital stock of a private corporation to which the right to the use of said waters has been conveyed by deed, a motion for a nonsuit in an action by them to enjoin interference with the flow of water from said wells on the ground that they are not parties in interest will not be entertained. (Bower v. Moorman, 162.)

17. Sec. 3242, Rev. Codes, provides: "The right to the use of waters of rivers, streams, lakes, springs and subterranean waters may be acquired by appropriation." (Bower v. Moorman, 162.)

18. As between appropriators of subterranean waters, the first in time is the first in right. (Bower v. Moorman, 162.)

19. Where subterranean water exists in a state of nature throughout a tract of land the ownership of which is held in different proprietors, it would seem to be impossible to adopt a rule giving each proprietor the absolute right to withdraw all of the subterranean waters from his tract of land, and thus destroy the benefits made possible by the proper regulation of subterranean waters. And an injunction will issue to restrain any permanent interference by an adjoining land owner with the right to the use of subterranean water acquired by a prior appropriator. (Bower v. Moorman, 162.)

20. Before a permanent injunction should issue in a case of this character, the evidence should clearly and conclusively establish that the real cause of the loss of water flowing from the well of a prior appropriator of subterranean water is the construction of the well of a junior appropriator of said subterranean water. (Bower v. Moorman, 162.)

21. If the sinking of M.'s well to the depth that B.'s large well has been sunk, or to a greater depth, would not interfere with the

WATERS AND WATERCOURSES (Continued).

flow of the water in B.'s well, or if there was a loss of water in B.'s well occasioned by the sinking of M.'s well, which, in like quantity, could be returned to B.'s well without material damage, and at the same time water secured in M.'s well, the court would not be justified in issuing a permanent injunction preventing the completion of M.'s well. (*Bower v. Moorman*, 162.)

22. Should it become necessary to change the method or means of diverting water by a prior appropriator of subterranean waters, that, in and of itself, should not deprive a subsequent appropriator from acquiring unappropriated subterranean water, unless it further appeared that it would be impossible to deliver said water to the diverting works of the prior appropriator. (*Bower v. Moorman*, 162.)

23. Although it may be found that in the sinking of a well by a land owner direct communication was made with the same artesian belt or basin tapped by an adjoining land owner, who was a prior appropriator of subterranean water, the court would not be justified in issuing a perpetual injunction prohibiting the completion of the well of a junior appropriator of subterranean waters, unless it further conclusively appeared that the prior appropriator would suffer permanent loss of water by reason of the tapping of said artesian belt or basin. (*Bower v. Moorman*, 162.)

24. The fact that the sinking of a well would endanger the supply of water flowing from a well on adjoining land owned by a prior appropriator of subterranean waters, would not justify the issuance of a permanent injunction, unless it were conclusively shown that the water supply of the first appropriator would be actually and permanently diminished. (*Bower v. Moorman*, 162.)

25. If, in the sinking of a well, the flow from a well of an adjoining land owner and prior appropriator of subterranean water is lessened, before a permanent injunction should issue, it must be conclusively established that the water so lost cannot be returned from the well of the subsequent appropriator to the diversion works of the prior appropriator. (*Bower v. Moorman*, 162.)

26. *Held*, that the findings of fact are not sufficient to support the judgment, and it is accordingly ordered that the case be remanded to the district court with directions to suspend the injunction, permitting appellants to continue the construction of the well on said lot 5, until it is established that by reason of the sinking of appellants' well the respondents' well will sustain a material and permanent loss of water supply; and if it shall later appear to the satisfaction of the district court that said actual loss of water has been sustained in respondents' well due to the construction of appellants' well, and such water cannot be returned to the diversion

WATERS AND WATERCOURSES (Continued).

works of respondents, said injunction should be reinstated, permanently closing the well of appellants. (*Bower v. Moorman*, 162.)

See Damages, 1-10; Eminent Domain, 8-15; Irrigation; Quieting Title, 4.

WITNESSES.*Cross-examination and Impeachment.*

1. Where a witness, having stated that the reputation of the complaining witness for truth, honesty or integrity in the community where he resided was bad, was asked, "In view of that reputation, would you believe him under oath?" in the absence of a proper foundation having been laid to show that the witness was in possession of such knowledge as would make him a competent witness to answer such question, it was not error for the court to refuse to permit the witness to answer. (*State v. Bouchard*, 500.)

2. Whether such a question is a proper one under the statutes of this state, *quære*. (*State v. Bouchard*, 500.)

3. *Held*, that in view of all the evidence in this case the action of the trial court in striking out a portion of the testimony of witness Trummel who, after testifying that the reputation of the complaining witness in the community of St. Marie was bad, upon cross-examination and apparently not responsive to the question, recited street gossip and conversations overheard by him of particular acts of bad conduct of the prosecuting witness, was not prejudicial error, the right to strike such testimony being largely within the sound discretion of the trial court, and where there is no abuse of such discretion, the verdict of the jury will not be disturbed. However, the practice of eliciting immaterial evidence and then moving to strike such testimony from the record is not to be commended. (*State v. Bouchard*, 500.)

4. It is proper upon cross-examination to inquire of a witness to an encounter as to any facts showing his ability or lack of ability, to properly observe, clearly understand, remember and relate what took place and, under the circumstances in this case, it was error for the court to prevent the appellant from inquiring of a witness, on cross-examination, as to whether he had been drinking on the evening of the homicide. (*State v. Tilden*, 262.)

See Criminal Law, 5-12.

WORDS AND PHRASES.

A cattle range in this state has a well-defined meaning, and so has a sheep range, and this meaning is fully recognized by persons engaged in the two industries. (*State v. Omaechevviaria*, 797.)

WORK AND LABOR.***Request to Continue Services.***

1. Where a request is made to continue services of a character theretofore rendered, or with regard to the same subject matter, the continuance of such services is a sufficient consideration to support a promise to pay for those rendered prior to such request. (Blackwell v. Kercheval, 537.)

2. The decision of this court in case of *Northern Pacific Railway Company v. Gifford*, 25 Ida. 196, adhered to. (Northern Pacific Railway Co. v. Gifford, 667.)

WRIT OF PROHIBITION.

See Prohibition, Writ of.



